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FRS. E. SPENCER.









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THE  
BANKRUPT LAW OF THE UNITED STATES.  
1867.

WITH NOTES, AND A COLLECTION OF AMERICAN AND ENGLISH  
DECISIONS UPON

THE PRINCIPLES AND PRACTICE  
OF THE  
LAW OF BANKRUPTCY.

ADAPTED TO  
THE USE OF THE LAWYER AND MERCHANT.

BY EDWIN JAMES,  
OF THE NEW YORK BAR, AND ONE OF THE FRAMERS OF THE RECENT  
ENGLISH BANKRUPTCY AMENDMENT ACT.

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## INTRODUCTION.

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The Constitution of the United States delegates to Congress "the power to establish uniform laws on the subject of bankruptcies throughout the United States."

Every commercial country has some system of bankruptcy. It was introduced into the jurisprudence of the Roman empire, and made universal by succeeding Christian emperors. The French and the Teutonic nations have adopted the system in their various codes, and in England it has prevailed for more than two centuries.

The power to establish a law of bankruptcy has been exercised intermittently and at considerable intervals, to meet special emergencies arising out of commercial difficulties, and the laws enacted under it were repealed before they had formed even the basis of a system of legislation.

The failure of the attempts at legislation upon this important subject is historic.

The Bankrupt Act of 1800 was substantially for creditors only. It was a carefully-prepared Digest of the English statutes as they then existed, upon the subject of bankruptcy, without any proper adaptation of the system to the peculiar interests of commerce in this country.

The Bankrupt Act of 1841 was in fact for the benefit of debtors only, and it was reported originally as a purely voluntary system. In the course of the discussion in Congress on the bill, amendments were ingrafted upon it which were intended to secure and protect the interests of creditors, but were found by experience to be inefficient and illusory. This objection to that



law was one of the causes, if not the main cause, which allowed it such a short-lived existence, and induced its sudden repeal.

Adopting the improved legislation of England upon the law of bankruptcy, tempering in many instances its harshness and severity, but enacting stringent provisions to exact honesty from the debtor, this act is intended to accomplish two objects:

1st. The discharge of the honest but unfortunate debtor upon the complete surrender of his property to his creditors.

2d. The protection of the creditor against the fraudulent practices and dishonest conduct of his debtor.

It contains provisions both for VOLUNTARY and COMPULSORY BANKRUPTCY, and for the first time in this country brings the failing debtor and his creditors upon a ground of negotiation and adjustment equally beneficial to both.

Avoiding the complications with which the system of bankruptcy has been entangled in England by excessive legislation, it adopts those provisions from the English statutes which the test of experience has shown to be beneficial in their operation.

Some experience as a legislator upon this subject, and many years practice in the English courts of bankruptcy, have induced the author to undertake this work.

His object has been to collate those authorities, American and English, which explain and elucidate the principles which regulate and control the administration of the law of bankruptcy; and by notes to the sections of the act, written in as clear and lucid style as he could command, to afford assistance to the legal practitioner and general reader upon the questions, sometimes complicated and difficult, which will arise in the application of its various provisions.

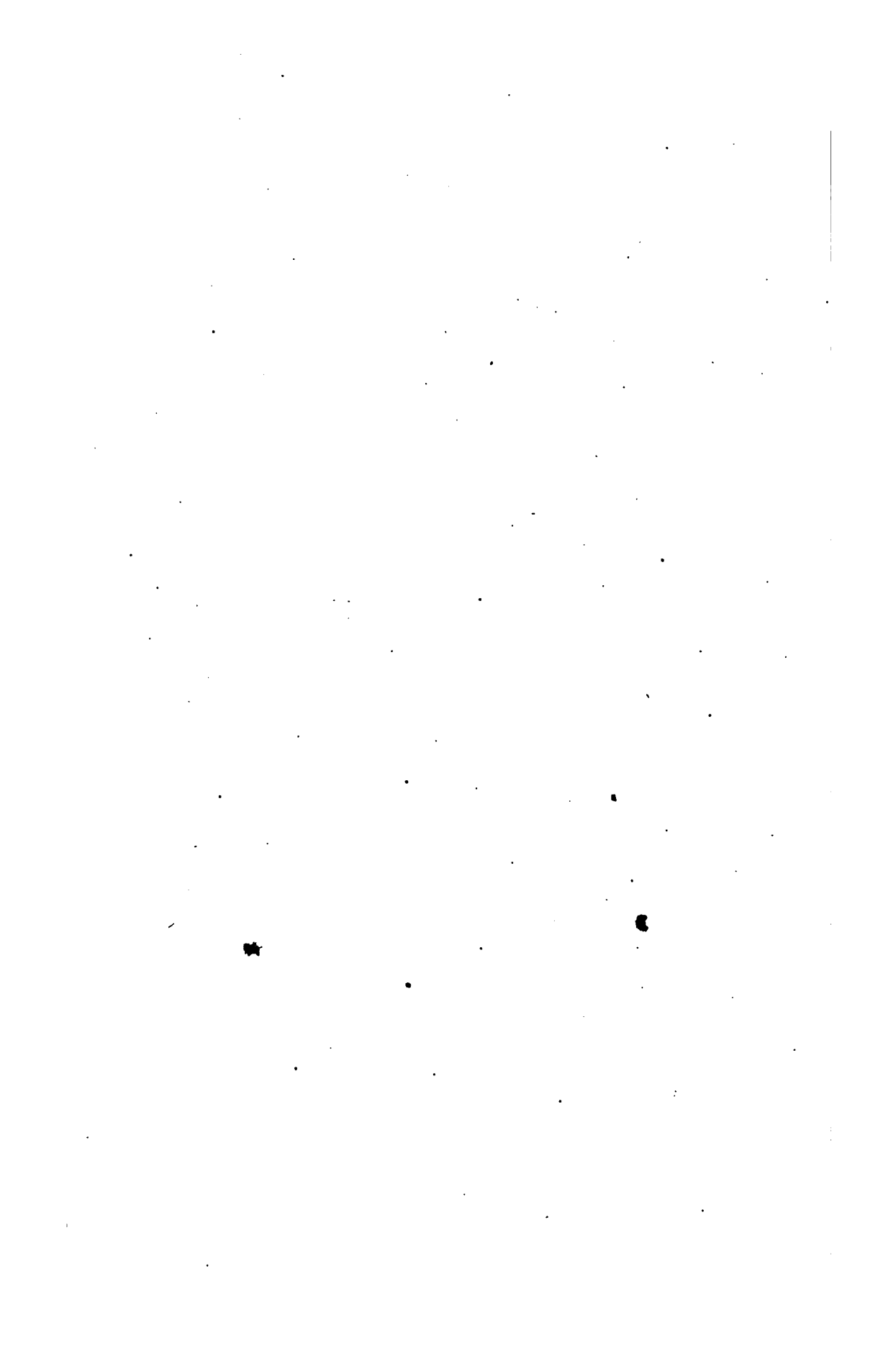
To the ability and untiring energy of Mr. Thomas A. Jenckes, member of Congress from Rhode Island, is mainly due the passage of an act which the author believes will do much to place the commercial relations of this great country upon a sound and healthy basis.

In the very first position among maritime and commercial na-

tions, transacting a vast trade between her different states, and a widely-extended commerce throughout the world, with a love of enterprise and speculation which are national characteristics, the United States, beyond all other countries, required an impartial, a just, and a uniform system of bankruptcy law.

The author records his acknowledgment of the services rendered by his pupil, Mr. John H. Jackson, in the collection of American decisions, and his assistance in the compilation of this work.

*293 Broadway, New York, April, 1867.*



# THE BANKRUPT LAW.

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## DISTRICT COURTS.

### THEIR JURISDICTION AND POWERS.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the several District Courts of the United States be, and they hereby are, constituted Courts of Bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting in chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims

thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein in equity. Said courts may sit for the transaction of business in bankruptcy at any place in the district, of which place, and the time of holding court, they shall have given notice, as well as at the places designated by law for holding such courts.

**Constitutionality of a Bankrupt Law.**—The Federal Constitution declares that Congress shall have power to establish “uniform laws on the subject of bankruptcies throughout the United States.”—Art. 1, Sec. 8. This power has lain dormant, except for a short time, ever since the Constitution was adopted. It is evidently a system which the country has long needed. Mr. Justice Story observed several years ago “that one of the most pressing grievances bearing upon commercial, manufacturing, and agricultural interests, is the total want of a general system of bankruptcy.”—Story on Conflict, § 541. “Although the above constitutional provision passed the Convention with little opposition—Connecticut having voted against it—wiseacre politicians have sought from time to time to fetter the action of Congress by interpolating a rule of construction equally repugnant to good sense and sound policy.” Marshall, C. J., in the case of *Gibbon vs. Ogden*, 9 Wheaton, 188, observed “that he could not perceive the propriety of a strict construction, nor adopt such as the rule by which the Constitution should be expounded.” “The enlightened patriots,” he remarks, “who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.”

Justice Catron, in *Klein's case*, 1 How. Rep., 277, sustained the Bankrupt Law of 1841 as constitutional. “The power to establish uniform laws of bankruptcy,” says Mr. Madison in the *Federalist*, XLII, “is so intimately connected with the regulation of commerce,

and will prevent so many frauds when the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." Laws made in pursuance of the Constitution constitute the supreme law of the land, any thing in the Constitution or laws of a State to the contrary notwithstanding.

Before the adoption of our Federal Constitution, the States severally possessed the exclusive power, as belonging to general sovereignty, to pass such laws; as prior to that time no such thing as a Bankrupt Law, *eo nomine*, had ever been enacted in this country.

A defect seriously felt under the Confederation was the want of a uniformity—as laws of "naturalization" and "bankruptcy"—a coercive authority operating upon individuals as guarantee of internal tranquillity. Charles Pinckney thus carefully prepared and submitted the proposition which is embodied in our organic law. Mr. Rawle observes in his work on the Constitution, p. 101, that until this right of Congress of passing a Bankrupt Law is exercised, States are not prohibited from passing such laws, but such right is suspended from that time. While the act of Congress is in force, the power of a State continues over such cases as the law does not embrace; but no State bankrupt or insolvent law can be permitted to impair the "obligation of contracts," and no State law can act upon the rights of citizens of other States.

Thus the Supreme Court determined years ago, by a series of decisions, 4 Wheaton's Rep., 122, 12 Id., 273, the following points: 1st. That State insolvent laws can not discharge the obligation of antecedent contracts. 2d. That the power of Congress to pass Bankrupt Laws is not an exclusive grant; it may therefore be exercised within constitutional limits by the States. 3d. That a State may pass valid laws discharging the person of the debtor and his after-acquired property from debts contracted after the passing of such law. 4th. That such a discharge is valid only between the citizens of the State by which the law was passed. 5th. That the insolvent law of one State does not discharge the debtor from debts which he has contracted in another State. The doctrine seems to obtain that Congress has exclusive power to pass Bankrupt Laws, but that a State may exercise the right under restrictions. Mr. Justice Washington, of the Supreme Court of the United States, maintained that this power was "exclusively in Congress." One other judge then on the bench is known to have held the same opinion. Since the law of 1841 it has been held that a State insolvent law may exist in full vigor, so far as it does not impede the operation of a Bankrupt Law of Congress. In the case of *Kunzler vs. Kohans*, 5 Hill, 817, and also in *Sackett vs. Andross*, 5 Id., 327, wherein the law of 1841 was elaborately discussed, it was held that voluntary as well as involuntary bankruptcy is constitutional, applying to debts created before as well as after the passage of the law. Bronson, J., and Wells, J., of the Supreme Court, held otherwise; but insolvency and bankruptcy being practically and theoretically the same—as a historical review of the colonial and State legisla-

tion will abundantly show—there seems to be no just and legal ground for such opinion. After carefully reviewing the several works on the Constitution, and the various cases arising under the Bankrupt Laws of 1800 and 1841, there appears no prudent or valid reason for not acquiescing in the entire constitutionality of such a law.

The District Court of the United States in every district is constituted a Court of Bankruptcy, and invested with *original* jurisdiction in all matters and proceedings in bankruptcy. Such courts are to be always open for the transaction of bankruptcy business. A judge of the Court of Bankruptcy has the same power when sitting in chambers as when presiding in open court.

The Jurisdiction extends to all cases and controversies between the bankrupt and his creditors, to the collection of the assets of the bankrupt's estate, and generally for the efficient working of the law of bankruptcy.

Orders and Decrees of the Court.—The same authority is given to compel obedience to all orders and decrees of the court made and pronounced in the administration of bankruptcy, as such courts now have in any suit pending therein in equity.

Sittings of the Court.—The Courts of Bankruptcy may sit in any place within their several districts, and hold their courts after public notice.

Under the Bankruptcy Law of 1841, a District Court of the United States, sitting in bankruptcy, had jurisdiction in respect to mortgages and liens on the property of the bankrupt, to determine their validity and extent. But such jurisdiction was not exclusive; it was to be exercised directly upon the parties themselves by injunction, or other appropriate proceeding in equity. The District Court had no control over the State Courts themselves, and could not set aside a foreclosure and sale of mortgaged property of a bankrupt on a bill filed in a State Court to foreclose the mortgage, when no objection was made to the validity of the mortgage itself, but only to the jurisdiction of the court.—*Norton vs. Boyd*, 3 How., U. S., 426. Vide also *Ex parte Christy*, 3 How., U. S., 292.

The Bankrupt Act of 1841 gave to the District and Circuit Courts complete jurisdiction, to accomplish all the purposes of the act, and enabled each court to begin and end all such proceedings as might be necessary for the settlement of the bankrupt's estate.—*Mitchell vs. The Great Works Milling and Manufacturing Co.*, 2 Story, 648. The District Courts, by the Bankrupt Law of 1841, were possessed of the full jurisdiction of courts of equity over all subject matters arising in bankruptcy.—*Ex parte Foster*, 2 Story, 131. The District Court, when sitting in bankruptcy, had jurisdiction over liens and mortgages existing upon the property of bankrupts so as to inquire into their validity and extent, and grant the same relief which the State Courts might or ought to grant.—*Ex parte Christy*, 3 How., U. S., 292. The control of the District Court over proceedings in the State Courts upon liens is exercised, not over the State Courts themselves, but upon the parties through an injunction or other appropriate proceeding in equity. Vide case last cited. In case of

a contested claim on the bankrupt's estate, the District Court has jurisdiction of a formal bill in equity or other plenary proceeding, or of a summary proceeding.—*Ex parte Christy*, 3 How., U. S., 292.

The District Court had jurisdiction in all matters and proceedings arising under the Bankrupt Act of 1841, and might entertain proceedings in equity, although an action at law could equally have been maintained.—*The Chemung Canal Bank vs. Judson*, 4 Selden, N. Y., 254.

The powers of the District Courts of the United States in regard to the administration of the Bankrupt Law of 1841 were regarded as special and summary; so that in such cases the jurisdiction must appear, or be distinctly shown.—*Morse vs. Presley*, 5 Foster, N. H., 299.

The proceedings of the United States District Court, in cases of bankruptcy, are in the nature of a proceeding *in rem*—like a proceeding in the English courts to obtain an outlawry.—*Downer vs. Rowell*, 25 Vt., 2 Deane, 336.

In order to give the District Court jurisdiction of a petition for a discharge in bankruptcy, the petitioner must be a resident of the district where the petition is filed. That fact must, therefore, be averred in the petition.—*Johnson vs. Ball*, 15 N. H., 407.

Rights vested in creditors by a *cessio bonorum*, so far as they relate to the property ceded, are unaffected by subsequent proceedings of the insolvent, in causing himself to be declared a bankrupt under the act of Congress of August 19, 1841. Section 8, Art. 1, of the United States Constitution provides that Congress shall have the power to establish "uniform laws on the subject of bankruptcy throughout the United States." This power was specially delegated to Congress, and only reserved by the several States in so far and so long as Congress did not see fit to exercise it. The moment Congress exercised the power, the State laws on the subject became inoperative and were suspended.—*Beach vs. Miller*, 15 La. An., 601.

## CIRCUIT COURTS.

### THEIR JURISDICTION AND POWERS.

SECTION 2. *And be it further enacted*, That the several Circuit Courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity. The powers and jurisdiction hereby granted



may be exercised either by said court, or by any justice thereof, in term time or vacation. Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the <sup>same</sup> district, of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *provided*, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

**Circuit Courts.**—Within and for the district where proceedings in bankruptcy are pending, the Circuit Courts have concurrent jurisdiction of all cases and questions in administration of bankruptcy under the act as courts of equity, and have concurrent jurisdiction in all suits at law and in equity to which the assignees, as plaintiffs or defendants, are parties in all matters concerning the estate and property of the bankrupt vested in or claimed by them. The Circuit Courts of the United States have jurisdiction under the Bankrupt Law to set aside the transfer of property by the bankrupt in fraud of the law, and in the same proceeding direct that such property be distributed according to their legal rights among creditors having valid liens thereon. — *M'Lean vs. Meline*, 3 *M'Lean*, 199. The Circuit Courts of the United States have jurisdiction in all cases in which a suit is brought by or against the assignees of a bankrupt, and the claimant can not be compelled to go into the State Courts to assert his rights as such. — *M'Lean vs. Lafayette Bank*, 3 *M'Lean*, 185. The District Court of the United States, before which proceedings in bankruptcy were pending, had power to enjoin the enforcement of any of the debts of the bankrupt in any other tribunal, and a sale of the property of the debtor after notice of injunction renders the officer liable. — *Stinson vs. M'Murray*, 6 *Humph.*, 339. The District Courts have jurisdiction over liens and encumbrances on the property of bankrupts, and the assignees of bankrupts may in those courts compel a foreclosure of mortgages, and the enforcement of liens generally, with a view to the ascertain-

ment and proper distribution of the assets of the bankrupt.—*Russel vs. Cheatam*, 8 S. & M., 703.

The act, therefore, constitutes the District Court as the court in which all the proceedings in bankruptcy are to originate; the Circuit Courts having a general superintendence and jurisdiction of all cases and questions arising under the act, so that some question to be litigated must have arisen before the District Court to give the Circuit Court jurisdiction. The Circuit Court is the Appellate Court from the District Court, and writs of error are to be brought from the District Court to the Circuit Court under the modifications prescribed by the act. Vide note, "Appeals."

**State Courts—their Jurisdiction.**—The State Courts have not jurisdiction to carry the Bankrupt Law into effect. Congress have not power to give them such jurisdiction.—*M'Lean vs. Lafayette Bank*, 3 M'Lean, 185. The State Courts must be governed by the construction given to the Bankrupt Act by the courts of the United States.—*Russel vs. Cheatam*, 8 S. & M., 703. The State Courts have jurisdiction to enforce liens on the property of a bankrupt preserved under the Bankrupt Law, but this power does not draw to their jurisdiction the administration of the Bankrupt Law. Vide case last cited.

The Bankrupt Act of 1841, being within the powers of Congress, is superior to State laws on the subject; and judgments confessed in contravention of this law are void.—*Atkinson vs. Purdy, Crabbe*, 551.

The Bankrupt Act of 1841 was obligatory in all those States and Territories to which the ordinance of 1787 extended, as well as to the others.—*Stow vs. Parks*, 1 Chandler, Wis., 60.

The State Courts had jurisdiction in suits by the assignees of bankrupts under the Bankrupt Law of the United States of 1841.—*Hastings vs. Fowler*, 2 Carter, Ind., 216.

Where creditors are proceeding in a State Court to enforce liens on the property of the bankrupt, the Circuit Court would take jurisdiction of a bill for injunction on them if fraud be alleged, but not otherwise.—*Clarke vs. Rist*, 3 M'Lean, 494. The State Courts have jurisdiction to entertain an inquiry into the validity of a discharge of a bankrupt, which may be pleaded as an answer to any debt or claim prosecuted in such courts.—*Mabrey vs. Herndon*, 8 Ala., 848. In New York, when a bankrupt's discharge granted by a District Court of the United States is offered in evidence, it will be presumed that the court granting the discharge had jurisdiction till the contrary appears.—*Morse vs. Cloyes*, 11 Barb., Superior Ct., 100.

**Effect of the Act upon State Insolvent Laws.**—It was decided that the Bankrupt Law of the United States, upon going into operation in February, 1842, *ipso facto* suspended all action upon future cases arising under State insolvent laws where the insolvent persons were within the purview of the Bankrupt Law.—*Ex parte Eames*, 2 Story, 322. Where the debtor took advantage of the Insolvent Law of Massachusetts after the Bankrupt Law of the United States had come into operation, and an assignee was duly appointed in pursu-

ance of the law of Massachusetts, and the debtor subsequently petitioned to be declared a bankrupt under the law of the United States, it was held that an injunction ought to issue against the assignee in the insolvency proceedings, to restrain him from interfering with the property of the debtor.—*Ex parte Eames*, 2 Story, 322. It was held that the late Bankrupt Law of the United States, which was enacted August 19, 1841, and which expressly provided that it should take effect only after February 1, 1842, did not suspend the operation of the State insolvent laws until February 1, 1842.—*Larrabee vs. Talbott*, 5 Gill, 428.

When the jurisdiction of a Circuit Court once attached, it extended not only to the general merits of the bankrupt's case, but to the regularity and sufficiency of all the interlocutory proceedings. So held under the Bankrupt Law of 1841.—*Morrison vs. Woolson*, 9 Foster, N. H., 510.

In Iowa the Territorial District Courts had jurisdiction in bankruptcy under the Bankrupt Law of 1841.—*Wright vs. Watkins*, 2 Greene, Iowa, 547.

It was decided that the State Courts of New Hampshire had no jurisdiction of the crime of perjury committed in an examination before a commissioner in bankruptcy appointed under the Bankrupt Law of 1841.—*The State vs. Pike*, 15 N. H., 83.

**Construction of the Act.**—The former Bankrupt Acts of the United States of 1800 and 1841 having consolidated the provisions of the English statutes of bankruptcy, English decisions on the subject are applicable to the construction of them.—*Roosevelt vs. Mark*, 6 Johns Chn., 266; *Lummus vs. Fairfield*, 5 Mass., 249; *Livermore vs. Bagley*, 3 Mass., 511. And as this act embodies to a very large extent some of the most important provisions of the recent and improved legislation upon the subject of bankruptcy in England, the author has selected the most recent and leading decisions from the English courts of law and equity, and annotated them under their several titles.

**Limitation of Actions by and against Assignees to Two Years.**—No suit at law or in equity shall, in any case, be maintainable by or against the assignee, or by or against any person claiming an adverse interest touching the property, and rights of property, of the bankrupt transferable to and vested in the assignee, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee. It is also provided by the section that nothing therein contained shall revive a right of action barred at the time such assignee is appointed. The two years' limitation in the Bankrupt Law of 1841 was intended to prevent the adverse claims of third persons from impeding the settlement of bankrupts' estates, and extends only to cases where there is such adverse interest.—*Union Canal Company vs. Woodside*, 11 Penn. State Rep., 1 Jones, 176. The limitation of actions in the 8th Section of the United States Bankrupt Law of 1841 did not operate to bar an action brought in the name of the assignee of a bankrupt upon a note given to a bankrupt after peti-

tion filed, but before the decree of bankruptcy.—Carr vs. Lord, 29 Maine, 16 Shep., 51.

The limitation of two years for the commencement of suits by an assignee under the Bankrupt Law does not apply to applications to the chancellor for orders or rules to refund money paid under a decree which has been reversed.—Kane vs. Pilcher, 7 B. Mon., 651. An assignee in bankruptcy can not sue in the State or Federal Courts after the lapse of two years from the time of the declaration and decree in bankruptcy, if the cause of action had then accrued, to recover the property of the bankrupt.—Comegys vs. M'Call, 11 Ala., 932. An assignee can not sue after two years from the date of the decree in bankruptcy, or from the time when the cause of action accrued; and if the defect in not bringing the action within that time appeared on the face of the declaration or complaint, it may be reached by demurrer.—Harris vs. Collins, 13 Ala., 388. It was held that the limitation of the Bankrupt Law of 1841 applied to actions in the name of the assignee, though brought wholly for the benefit of a third party.—Pike vs. Lowell, 32 Maine, 2 Red., 245.

**Jurisdiction in Bankruptcy in the District of Columbia, and in the several Territories of the United States.**—When the bankrupt resides within the District of Columbia, or any of the Territories of the United States, it is provided by Section 49 that all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases of bankruptcy, are thereby conferred upon and vested in the Supreme Court of the United States for the District of Columbia, and in and upon the Supreme Courts of the several Territories of the United States.

**Judicial Districts not within any organized Circuit of the United States.**—The last mentioned section also provides that, in those judicial districts which are not within any organized circuit of the United States, the powers and jurisdiction in bankruptcy of a Circuit Court may be exercised by the district judge.

## REGISTERS.

### THEIR DUTIES AND POWERS.

**SECTION 3.** *And be it further enacted,* That it shall be the duty of the judges of the *District* Courts of the United States within and for the several districts to appoint in each congressional district in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the District Court in the performance of his duties under this act.

No person shall be eligible to such appointment unless he be a counselor of said court, or of some one of the Courts of Record of the State in which he resides. Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof; and he shall, in open court, take and subscribe the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy in either the District or Circuit Court in his district.

SECTION 4. *And be it further enacted,* That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty, to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to administer oaths in all proceedings before him, to hold and preside at meetings of creditors, to take proof of debts, to make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case, to audit and pass accounts of assignees, to grant protection, to pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose, and to sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct; and he shall also make short

memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the District Court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute-book to be kept in his office, and any register of the court may act for any other register thereof: *provided, however*, that nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge; but in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge. No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy, in either the Circuit or District Court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said Courts of Bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts. The fees of said registers, as established by this act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this act.

**Office and Duty of Register.**—The appointment of this officer, upon whom will devolve important duties, and, in disputed cases, the chief portion of the practical and administrative business of bankruptcy, has been adopted from the two last English Bankrupt Acts. In both voluntary and compulsory bankruptcy, where the adjudication is not contested, the register is to make it; he is to receive the surrender of the bankrupt, to preside at meetings for the proof of debts, to compute dividends under the estate, to audit and pass the

accounts of the assignees, to grant protection to the bankrupt after he has surrendered, and when the last examination of the bankrupt is not opposed, he is to pass it. He is to sit in chambers in bankruptcy, and conduct, in addition, such of the business as may be specially directed by the judge, and as may be defined in the general rules and orders. He is to keep a docket of all cases in which he acts, and such docket is to form the minute-book of the proceedings of the court.

The register has no power to commit for contempt, nor to hear any question of adjudication of bankruptcy when disputed, nor any application for the allowance or suspension of the bankrupt's discharge. Where issues of law or of fact are raised and contested by parties before him, such questions are to be reduced to writing by the parties, and then adjourned by him into court for the decision of the judge.

The register is prohibited from acting as attorney or counsel in any suit or matter pending in bankruptcy in either the Circuit or District Court of his district, or in any appeal therefrom.

He can not be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of, or connected with any estate within the jurisdiction of the Courts of Bankruptcy in which he performs the duties of register, nor can he be interested in any fees or emoluments arising from either of the said officers or trusts. The power of appointing these officers is vested in the judges of the District Courts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States. One register may be appointed in each congressional district, who must be a counselor of the District Court, or of some one of the Courts of Record of the State in which he is resident. His remuneration is from fees payable by the parties for whom his services are rendered, such fees being regulated by the act, and the general rules and orders.

SECTION 5. *And be it further enacted*, That the judge of the District Court may direct a register to attend at any place within the district, for the purpose of hearing such voluntary applications under this act as may not be opposed, of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this act; and the traveling and incidental expenses of such register; and of any clerk or other officer attending him, incurred in so acting, shall be settled by said court *in accordance with the rules prescribed under the 10th Section of this act*, and paid out of the assets of the estate in respect of which

such register has so acted; or if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge; and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the District Court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents: *provided always*, that all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing and be signed by him, and shall be filed in the clerk's office as part of the proceedings. Such register shall be subject to removal by the judge of the District Court, and all vacancies occurring by such removal, or by resignation, change of residence, death, or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

For the purpose of convenience to the suitors, and expediting business, the judge of the District Court may direct the register to attend at any place within the district to hear *voluntary* applications which are unopposed, to attend meetings of creditors, receive proofs of debts, and generally for the prosecution of the proceedings in bankruptcy. His expenses and those of any clerk attending him are to be paid, according to the rules prescribed in the 10th Section, out of the assets of the estate; or, if there be no assets sufficient to reimburse him, his expenses are to be apportioned by the judge, and, when apportioned, to form a part of the costs of the proceedings in which he has acted. The register has power to summon and examine persons and witnesses, and to require the production of books, papers, and documents; he is vested with all the powers of the District Court in the summoning and examination of witnesses, and requiring the production of papers and documents, but has no power to commit for contempt for disobedience of his orders. In such event, under the provision of Section 7, he is to refer the matter to the judge. Vide notes to Section 7.

Depositions taken before the register, and all acts done by him, are to be reduced into writing, signed by him, and then filed in the clerk's office. These will form the record of the proceedings in bankruptcy.



The judges have power to remove the register and appoint another in his place.

SECTION 6. *And be it further enacted,* That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court. In any bankruptcy, or in any other proceedings within the jurisdiction of the court under this act, the parties concerned, on submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court; and the judgment of the court shall be final, unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this act. The parties may also, if they think fit, agree that, upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

This section affords a simple mode of obtaining the opinion of the judge on any question of law arising upon facts agreed upon between the parties. The register is to state the question in the shape of a short certificate to the judge, who, upon approval, signs it, and, when signed, it is to be binding upon the parties. The certificate may, however, be varied, or discharged by the judge at chambers or in open court.

A special case may at any time be stated by parties litigating any question under the bankruptcy for the opinion of the court, and

an amount may be agreed upon, or any property in dispute may be transferred or delivered over, or be paid, when judgment on the case has been pronounced.

SECTION 7. *And be it further enacted,* That parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpcena; and all persons willfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury. If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such examination, and such person shall also be liable to be punished for contempt.

**Register to Summon Parties and Witnesses.**—This section gives power to the register to summon before him parties and witnesses, and compels their attendance under the same penalty of contempt as exists for disobedience to an ordinary subpoena of the District Court. Any person examined before the register, and refusing or declining to answer, is guilty of a contempt, but the register has no power of his own authority to commit. It will be his duty to refer the matter to the judge of the District Court, who has power to compel the signing of the examination, and to punish in his discretion for contempt. Vide note, "Examination of Bankrupts and other Parties."

## APPEALS AND PRACTICE.

SECTION 8. *And be it further enacted,* That appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed to said

Circuit Courts from said District Courts in cases at law under the jurisdiction created by this act when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court for the same district; but no appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from. The appeal shall be entered at the term of the Circuit Court, which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same. But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the District Court as if no appeal had been taken, and no appeal shall be allowed, unless the appellant at the time of claiming the same shall give bond in manner now required by law in cases of such appeals. No writ of error shall be allowed, unless the party claiming it shall comply with the statutes regulating the granting of such writs.

**Appeals and Writs of Error.**—Appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed from the District Courts to the Circuit Courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars.

**Time limited for Appeal.**—No appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within *ten days* after the entry of the decree or decision appealed from. The appeal is also to be entered at the term of the Circuit Court, which shall be *first* held within and for the district next after the expiration of *ten days* from the time of claiming the same.

**Waiver of Appeal.**—If the appellant in writing waives his appeal before any decision thereon, the proceedings may be continued in the District Court as if no appeal had been taken.

**Security on Appealing.**—No appeal is to be allowed, unless the appellant, at the time of claiming the same, shall give bond in the manner now required by law in cases of such appeals. Vide Conkling's Practice in the Courts of the United States, pp. 680, *et seq.*

**Writs of Error.**—No writ of error is to be allowed, unless the party claiming it shall comply with the statutes regulating the granting of such writs. Vide Conkling, *ut supra*, title "Writs of Error."

**Appeal by Creditor when Claim rejected.**—The 24th Section provides specifically for the appeal in such cases. Vide Section 24, and notes thereto.

**SECTION 9.** *And be it further enacted,* That in cases arising under this act, no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed two thousand dollars.

**Appeal from the Circuit Courts to the Supreme Court of the United States.**—In cases arising under this act, no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed the sum of two thousand dollars. Vide Conkling Treatise, *ut supra*, pp. 38, 39.

## GENERAL ORDERS.

**SECTION 10.** *And be it further enacted,* That the justices of the Supreme Court of the United States to the provisions of this act shall frame general orders for the following purposes:

For regulating the practice and procedure of the District Courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this act;

For regulating the duties of the various officers of said courts;

For regulating the fees payable, and the charges and costs to be allowed, except such as are established by this

act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings;

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this act into effect.

After such general orders shall have been so framed, they, or any of them, may be rescinded or varied, and other general orders may be framed in manner aforesaid, and all such general orders so framed shall, from time to time, by the justices of the Supreme Court, be reported to Congress, with such suggestions as said justices may think proper.

General orders are to be framed by the justices of the Supreme Court of the United States, to come into operation contemporaneously with the act to regulate the procedure of the District Courts; to regulate the duties of the various officers of the courts, and upon the several subjects specified in the section.

## VOLUNTARY BANKRUPTCY.

SECTION 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition, addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire

to obtain the benefit of this act, and shall annex to his petition a schedule, verified by oath before the court, or before a register in bankruptcy, or before one of the commissioners of the Circuit Court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and, if not known, the fact to be so stated, and the sum due to each creditor; also the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same; and shall also annex to his petition an accurate inventory, verified in like manner, of all his estate, both real and personal, assignable under this act, describing the same, and stating where it is situated, and whether there are any, and, if so, what encumbrances thereon, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt; *provided*, that all citizens of the United States petitioning to be declared bankrupt shall, in filing such petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy. And the judge of the District Court, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by

mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state:

1st. That a warrant in bankruptcy has been issued against the estate of the debtor.

2d. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

3d. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a Court of Bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

**Who may Petition.**—"Any person" residing within the jurisdiction of the United States may petition. The English Bankrupt Acts expressly enact that *aliens* trading to or from England should be subject to the Bankrupt Law, and entitled to its benefits. Aliens who have resided here for the period required by the section may petition under the act; and if an act of bankruptcy has been committed by them in any State, District, or Territory of the United States, may be made bankrupts compulsorily. And this, whether the debts have been contracted in this or any foreign country. The English authorities upon this subject, although decisions upon English statutes, tend to establish this position.—*Alexander vs. Vaughan*, Cowp., 398; *Allen vs. Cannon*, 4 Barn. & Ald., 418; *Ingliss vs. Grant*, 5 Term. Rep., 530; *ex parte Smith*, Cowp., 402; *Bird vs. Sedgwick*, 1 Salk., 110. Vide *Taylor vs. Carpenter*, 3 Story, 458, as to the rights of aliens in the courts of this country.

Infants were held to be entitled to the benefits of the Bankrupt Law of 1842.—*Ex parte Book*, 3 M'Lean, 317.

An adjudication in compulsory bankruptcy can not be sustained against an infant upon debts incurred by him during his infancy. And it is presumed, notwithstanding the decision above cited, that he can not voluntarily petition under the act to be relieved from debts incurred during his infancy, until after he has attained his majority. The contracts of an infant being voidable only, he may, after attaining his majority, ratify them; but until he has done so,

no debts incurred during his infancy are provable under his bankruptcy. — *Belton vs. Hodges*, 2 M. & Scott, 496; *ex parte Watson*, 16 Vesey, 265; *ex parte Moule*, 14 Vesey, 603; *ex parte Barwise*, 6 Vesey, 601; *Rex vs. Cole*, 1 Lord Raymond, 443. A petition by an infant under this act after attaining his majority might be held to be a ratification of his debts set forth in his schedule; and those debts being thus ratified, would be provable under his bankruptcy, and would be discharged therefrom; but the author ventures to suggest that an infant during his infancy can not voluntarily petition under the provisions of this act, except in cases where judgments have been obtained against him. In the case of *ex parte Watson*, 16 Vesey, 265, Lord Eldon, upon an application by a trader to annul an adjudication of bankruptcy, on the ground that he was under the age of twenty-one years at the time it was issued, refused to entertain it, on the ground that the petitioner had held himself forth to the world as an adult and *sui juris*, and traded in that character, and contracted debts to a considerable amount. He left the bankrupt to his remedy by action at common law.

**Married Women.**—In all cases where the trade of a married woman is not under the control of her husband, and he is not answerable for the debts contracted by her, or, in other words, in all cases where in actions against her upon her contracts a plea of coverture will be no answer, she is subject to the Bankrupt Laws as fully as a *feme-sole*.—*Ex parte Preston*, 1 Cooke, 40; *ex parte Mear*, 2 Bro., 266. Being subject to be made a bankrupt compulsorily, she has the right to petition voluntarily; but a married woman can not be made bankrupt in respect of debts incurred by her in trade or otherwise as a *feme-sole* before her marriage.

**An Executor** who in that character has carried on business and incurred debts in pursuance of the will of his testator, may be compulsorily made bankrupt, and, therefore, may voluntarily petition.—*Ex parte Garland*, 10 Vesey, 110; *ex parte Richardson*, 1 Madd, 138.

**Undischarged Bankrupt** can not voluntarily petition, nor can an adjudication of a second bankruptcy be made against him; such adjudication would be a nullity, because his property, as well after acquired as otherwise, is already assigned and vested in assignees under his first bankruptcy.—3 Mont. & Ayrton, 294; 7 B. and C., 684.

**Indebtedness of the Petitioner.**—To entitle any person to petition under this act, the debts due by him, and provable under the act, must exceed the amount of three hundred dollars, and the character of the debts from which no discharge will be granted under the act are fully stated and specified in the 33d Section. Vide Section 33, and notes.

**Form of the Petition.**—The petition is to be addressed to the judge of the judicial district, and the form of it will be prescribed in the general orders and rules.

**Where the Petition is to be presented.**—The petition must be addressed to the judge of the judicial district in which the debtor has resided or carried on business for the six months next immediately



*preceding the time of filing such petition, or for the longest period during such six months.* This provision as to the residence of the debtor is taken from the English Bankrupt Act. The former Bankrupt Act of the United States of 1841 merely prescribed the residence "in any State, District, or Territory. It would seem, from the provisions of this section, that a residence of the debtor for six months immediately preceding the time of filing his petition within one district, and having carried on business for the same period within another, will give the petitioner the right to select either district wherein to present his petition. The courts will, however, be strict in entertaining the petition; the residence must not be a mere temporary one, but the usual residence of the debtor, and where his debts have been contracted; and this latter element should designate where the proceedings should be commenced. If there be any thing like collusion, or a desire to avoid investigation on the part of the creditors, or to put them to unnecessary inconvenience or expense, the court would dismiss the petition, and direct it to be presented in the district where the debts had been contracted, and where a majority of the debtor's creditors may reside.

**Schedule to be annexed to Petition.**—The debtor must annex to his petition a schedule, which he must verify by oath before the court, or before a register in bankruptcy, or before one of the commissioners of the Circuit Court of the United States. Such schedule must contain a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known, the fact to be so stated. It must also set forth the sum due to each creditor, the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise; the true cause and consideration of such indebtedness in each case, the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

**Inventory to be annexed to Petition.**—The debtor must also annex to his petition an inventory, to be verified in the same manner as his schedule. Such inventory must accurately set forth all his estate, both real and personal, assignable under the act; the inventory must describe the same, state where it is situated, and whether there are any, and if so, what encumbrances thereon.

**Oath of Allegiance.**—Every petitioner who is a citizen of the United States must, on filing his petition, take and subscribe the oath of allegiance and fidelity to the United States; such oath must also be filed and recorded with the register, with the other proceedings in the bankruptcy. The taking the oath is made a condition precedent to taking any action on the petition.

**Petition when filed to be an Act of Bankruptcy.**—The petition thus filed is to be an act of bankruptcy, and the petitioner thereupon is adjudged a bankrupt, and the date of the filing of such petition is to be deemed *the commencement of the proceedings in bankruptcy.*

**Consequences of Adjudication.**—In cases of voluntary bankruptcy, if there be no opposition, the register, if he be satisfied of the truth of the facts stated in the petition, and that the debts exceed the sum of three hundred dollars, is to issue a warrant, signed by him, directed to the marshal of the district, authorizing him to publish notices in the newspapers to be specified in the warrant; to serve written or printed notices on all creditors whose names appear in the petition as schedule, and to give such personal or other notices as the warrant may specify. The form of the warrant will be found in the general rules and orders.

**Form of the Notice.**—The section prescribes the form of the notice to be given in the following terms:

1st. That a warrant in bankruptcy has been issued against the estate of the debtor.

2d. That the payment of any debts, and the delivery of any property belonging to such debtor to him, or for his use, and the transfer of any property by him, are forbidden by law.

3d. That a meeting of the creditors of the debtor, to prove their debts and choose one or more assignees of his estate, will be held at a Court of Bankruptcy, to be holden at a time and place designated in the warrant, not less than *ten*, nor more than *ninety* days after issuing the same.

In cases of *voluntary* bankruptcy the messenger is not to seize nor take possession of the property of the bankrupt in the first instance, as in cases of *compulsory* bankruptcy. Vide Section 39, and notes. The section provides that, in case of opposition to the petition, the judge of the District Court is to issue the preliminary warrant, and not the register; but as the filing of the petition is entirely an *ex parte* proceeding, taken without any notice to the creditors, there can scarcely arise an opposition, and these duties must in practice devolve upon the register.

## MEETINGS OF CREDITORS.

**SECTION 12.** *And be it further enacted,* That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

**First Meeting of the Creditors.**—The register is to preside at the first meeting, when the messenger is in the first instance to make a return of what has been done under the warrant. In the event of any defect in the notices to the creditors, the meeting is to be adjourned, and new notices given.

**Death of the petitioning Debtor.**—If the debtor should die after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived. This provision is adopted from the English Bankrupt Acts, and was not contained in the Bankrupt Law of the United States of 1841. In the absence of such a provision, by the death of the bankrupt at any time during the proceedings, they would have abated. The English statutes enact, that “If any bankrupt shall die *after adjudication*, the court may proceed in the bankruptcy as if such bankrupt were living;” and it was held that the death of the petitioning debtor between *the petition and adjudication* would abate the proceedings.—*Humfrey vs. Scroope*, 13 Q. B., 509. This section provides, “That if the debtor dies *after the issuing of the warrant*, the proceedings may be continued;” the death, therefore, of the petitioning debtor at any time between the presentation of the petition and the issuing of the warrant would still abate the proceedings. Where one of the bankrupts died before the adjudication under a joint fiat in bankruptcy, it was ordered to be amended by omitting his name.—*Ex parte Hall*, 1 De Gex, 332.

### CHOICE OF ASSIGNEES.

SECTION 13. *And be it further enacted*, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at said meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order

a new election. The judge at any time may, and, upon the request in writing of any creditor who has proved his claim, shall require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

**Creditors who have proved their Debts to choose the Assignees.**—At the first meeting the creditors who have proved their debts are to elect one or more assignees of the estate of the bankrupt. The register is to preside at such meeting. The act provides that the choice is to be made by the greater part, in *value and in number*, of such creditors. The Bankrupt Act of the United States of 1841 conferred the power on the court to appoint the assignee; there was no elective power by the creditors. The English Bankrupt Acts, 23 and 24 Vic. C., 134, and 12 and 13 Vic. C., 106, provide that the majority in value of the creditors who have proved their debts are entitled to vote; but this section, as will be observed, requires a majority, both in value and in number, of the creditors to render an election valid. If at the meeting the creditors decline, or omit to make a choice, if there be any opposition, the judge has the power to appoint the assignees, and if there be no opposition, the same power is conferred on the register. All elections or appointments of assignees are subject to the approval of the judge, and he has the power to appoint additional assignees, and for good cause shown to cancel the election by the creditors, and order a new election. The assignee elected by the creditors, or appointed by the judge, should, within five days after his election or appointment, signify in writing his acceptance of the trust, and in default of his doing so, the judge or register may deem the office vacant and appoint another. The assignee may be required, either by the judge or upon the request in writing of any creditor who has proved his debt, to give bond to the United States for the due performance of his duties. Should he fail to give the bond within the time ordered, not exceeding ten days after notice to him of such order, he is liable to be removed. The choice of the assignees should in general be proceeded with at the first meeting, however few creditors may have proved their claims.—*Ex parte Butterfill*, 1 Rose, 196.

The court will not in general enlarge the time for the choice of assignees upon the *ex parte* application of a creditor.—*Ex parte* Lawdon, 1 Mont., D. & D., 555.

A person appointed by the court to prove and receive dividends can not vote in the choice of assignees.—*Ex parte* Shaw, 1 Glyn. & J., 127. Creditors holding securities for their debts may have such securities valued, and prove for the difference before such securities are sold, and vote in the choice of assignees.—*Ex parte* Nunn, 1 Rose, 322.

**Creditors ineligible to be Assignees.**—No person who has received any preference contrary to the provisions of this act shall vote for, or be eligible as assignee. Vide Section 18. As the object of the election is for the benefit of the general body of creditors, any person whose interest is manifestly adverse to theirs will be rejected; the attorney acting under the bankruptcy, or his partner, *ex parte* Badcock, 1 Mont. & Mac., 231, or a banker who is receiving the money under the bankruptcy.—*Ex parte* Lacey, 6 Vesey, 625. It is not essential that the party to be elected assignee should be a creditor.—1 Atk., 90; 4 East., 330. The bankrupt will not be allowed to be an assignee under his own estate, nor should he in any manner interfere in the election.—*Ex parte* Molineaux, 3 Mont. & Ayr., 703. Any fraud or collusion in conducting the choice of assignees will vitiate it.—1 Deac., 603. As a general rule, the parties elected assignees should be present to accept the trust.—*Ex parte* Heath, 4 Deac., 294.

**As to Removal of Assignees after they have been Appointed or Elected by the Creditors.** Vide Section 18, and notes thereto.—If an assignee elected by the creditors reside permanently out of the State, District, or Territory in which the proceedings are being carried on, it would be a ground for application for his removal. The assignee, when elected and duly qualified, has the right to appoint the attorney and counsel to conduct the subsequent proceedings in the bankruptcy, and, subject to the lien of the former attorney, may remove the papers and proceedings. This is the practice in the English Courts of Bankruptcy, such right being given to the assignees by statute, and will probably be adopted by the courts in the administration of this act. Before the statute this practice prevailed, and it seems just and reasonable.

## PROPERTY OF THE BANKRUPT VESTING IN THE ASSIGNEES.

**SECTION 14.** *And be it further enacted,* That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bank-

rupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings: *provided, however*, that there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States, and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States; and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four: *provided*, that the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees, and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired

or affected by any of the provisions of this act; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court: *and provided further*, that no mortgage of any vessel, or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations, and otherwise valid, and duly recorded, pursuant to any statute of the United States, or of any State, shall be invalidated or affected hereby; and all the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents, and patent-rights, and copy-rights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract, or from the unlawful taking or detention, or of injury to the property of the bankrupt; and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt; and a copy, duly certified by the clerk of the court under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the

bankrupt, as herein before mentioned; but no property held by the bankrupt in trust shall pass by such assignment. No person shall be entitled to maintain an action against an assignee in bankruptcy for any thing done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon; and no suit in which the assignee is a party shall be abated by his death or removal from office, but the same may be prosecuted and defended by his successors, or by the surviving or remaining assignee, as the case may be. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other encumbrances. The debtor shall also, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper, to enable the assignee to possess himself fully of all the assets of the bankrupt. The assignee shall immediately give notice of his appointment by publication, at least once a week for three successive weeks, in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bank-



rupt ought by law to be recorded; and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

Having treated of the duties and rights of assignees, it remains to ascertain about what *property* those duties and rights are to be exercised. It is proposed to consider what property of the bankrupt vests in his assignees, and the *time* from which their right to it commences.

The mode in which property passes from the bankrupt to his assignees is provided by the section, which enacts that, so soon as the assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto. This section also specifically vests in the assignees all property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents, patent-rights, and copy-rights; all debts due him or any person for his use, and all liens and securities therefor; all the bankrupt's rights of action for property or estate, real or personal; any cause of action which the bankrupt had, arising from contract, or from the unlawful taking or detention of the property of the bankrupt; all his rights of redeeming such property; and all his right, title, power, and authority to sell, manage, dispose of, sue for, recover, or defend the same, as the bankrupt could have had if no assignment had been made.

**Property of the Bankrupt vesting in the Assignees.**—It is proposed in the notes upon this subject to give a short synthetical statement of the property and interests of the bankrupt which pass, by virtue of the assignment made, to the assignees. Assignees in bankruptcy do not take the whole legal title in the bankrupt's property precisely in the same manner as do heirs or executors. Nothing vests in them but such estate as the bankrupt has the beneficial, as well as the legal interest in, and which is to be applied by them to the payment of the debts.—*Ontario Bank vs. Mumford*, 2 Barb. Chan., N. Y., 596. The assignees are subject to the same equities to which the bankrupt himself was subject, so that their title does not divest a legal or equitable lien, and they can take only such property as the bankrupt is equitably as well as legally entitled to.—*Deacon's Bankruptcy*, 3d edition, 429, 646. All the bankrupt's personal estate, and all property which may come to him before he has obtained his discharge under the bankruptcy, become actually vested in the assignees for the benefit of the estate under the assignment.

An assignee in bankruptcy succeeds to all the rights and interests of the bankrupt to precisely the same extent that the bankrupt himself had, subject to, and affected by all the equities, liens, and encumbrances existing against them in the hands of the bankrupt; and the same rule applies to the purchaser at an assignee's sale of the bankrupt's effects.—*Strong vs. Clawson*, 5 Gilman, 346.

Though contracts made by a bankrupt generally passed as property to his assignees under the Bankrupt Law of 1841, yet this was not universally true. For instance, contracts continuing after the bankruptcy, and depending on the future personal services of the bankrupt, did not pass. Contracts which must be a charge upon, instead of a benefit to the estate of the bankrupt, did not pass. Contracts which can not be made available for the payment of the debts did not pass.—*Streter vs. Sumner*, 11 Foster, N. H., 542.

All the rights and property of a bankrupt at the time of the filing of his petition vest in his assignees by relation; no lien in favor of creditors, therefore, can afterward attach, either by any act of the bankrupt or by judgment.—*M'Lean vs. Rockey*, 3 M'Lean, 235.

A son was indebted to his father. The father bequeathed to him a leasehold estate, and declared it to be "entirely free from any claim, charge, demand, or lien of my son's creditors, or any or either of them, or of any person claiming under him (the son), either at law or in equity." Soon after the father's death the son became bankrupt. Held that the assignees were entitled to the estate.—*Harvey vs. Palmer*, Eng. Law and Eq. Rep., 248.

The personal property of a bankrupt under the late Bankrupt Law of 1841, whether inserted in a schedule of effects or not, vested in his assignee on his appointment; and where such property was sold by the assignee, pursuant to an order of sale by the court, the property vested in the purchaser so as to enable him to maintain an action thereon in his own name.—*Jewett vs. Preston*, 27 Maine, 14 Shep., 400.

The property of a bankrupt is not divested until a decree of bankruptcy; and if before such decree he has applied partnership assets to the payment of his private debts, a ratification by his solvent partners will validate the transaction.—*Anshutz vs. Fitzsimmons*, 9 Barr, 180.

The rights of property of a bankrupt to which the assignee succeeds are those rights to which the bankrupt had either a legal or equitable title, which could be enforced in a court of justice. No right, therefore, to property of which the bankrupt had made a fraudulent assignment passes to his assignee.—*Reavis vs. Garnar*, 12 Ala., 661.

The Bankrupt Act of 1841 included the franchise of a toll-bridge as property within its contemplation, and it passed to the assignees under the bankruptcy.—*Stewart vs. Hargrove*, 23 Ala., 429.

A decree in bankruptcy under the act of 1841 passed the debtor's equities of redemption to the assignees, and a judgment creditor of the bankrupt could not afterward redeem under the laws of Tennessee.—*Pillow vs. Langtree*, 5 Humph., 389.

The assignees take the property and rights of property of the bankrupt, subject to all such rights and equities of third persons as are attached to it in the hands of the bankrupt.—*Ex parte Newhall*, 2 Story, 860. Assignees in bankruptcy, except in cases of fraud, take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of the bankruptcy.—*Mitch-*

ell vs. Winslow, 2 Story, 630. Where the bankrupt, after filing his petition, and before a decree of bankruptcy, became entitled to certain property as heir to his mother, to whom when alive he was indebted, it was held that the assignee of the bankrupt was only entitled to the bankrupt's distributive share after deducting therefrom his debt to the estate.—*Ex parte* Newhall, 2 Story, 360. An estate was devised unconditionally to A and his sister. Subsequently to this, but before the will had been admitted to probate, A filed his petition to be declared a bankrupt. Held that the estate so devised became the property of the assignees under the bankruptcy, and that they might sell and convey the same as part of the estate of the bankrupt.—*Ex parte* Fuller, 2 Story, 327.

**Bills and Notes in the Possession of the Bankrupt.**—Whether bills of exchange and notes in the possession of a bankrupt not due at the time of the bankruptcy pass to the assignees, or remain the property of the parties who remitted such bills of exchange or notes to him, depends upon the question of agency, and the trusts arising out of that relation. For instance, a foreign mercantile house remitted to their correspondents in London bills of exchange, some of which were not due when the London house became bankrupts. It was held, under the circumstances of the case, and from the usage in that particular instance, that the London house acted as agents to procure payment of the bills of exchange for the foreign house, and, being fixed with the trust, that the property in the bills of exchange did not pass to the assignees under the bankruptcy.—*Ex parte* Smith, 2 Rose, 457.

So bills of exchange, and notes deposited with a banker by his customer for the purpose of obtaining payment, do not pass to the assignees of the banker on his becoming bankrupt.—*Ex parte* Atkins, 2 Mont., D. & D., 103. The question in all these cases is; whether the bills of exchange and notes thus deposited with a firm retain their form as bills and notes for the purpose of being collected or otherwise applied, or whether they have assumed the form of cash, and been considered, by the usage and dealing between the parties, as cash. In the latter event, they would pass to the assignees.—*Hornblower vs. Proud*, 2 B. & Ald., 327.

**Dower of the Wife.**—On the bankruptcy of the husband owning real estate, the wife can not be compelled to release her right to dower; the assignees, therefore, take all the interest of the bankrupt, subject to dower.—*Ex parte* Bell, 1 Glyn & J., 232.

**Choses in Action, and Debts and Claims of the Bankrupt.**—The assignees take all the bankrupt's debts by the express words of the act. They have also, under the general words of the section, a right to sue upon beneficial contracts made with the bankrupt, where the pecuniary loss is the substantial and primary cause of action; and for injuries affecting his property, so far as they do not involve a claim for personal damages, for which he would be entitled to a remedy, whether his property were impaired or not.—*Spence vs. Rogers*, 11 M. & W., 191; 13 M. & W., 571; 12 C. & P., 700. Vide *Brewer vs. Deu*, 11 M. & W., 625, where it

was held that the assignees could sue for an *asportavit* of goods, *per quod* the plaintiff was prejudiced in his business and believed insolvent, though not for mere personal wrongs, *Wright vs. Fairfield*, 2 B. & Ad., 727; *Hancock vs. Caffyn*, 8 Bing., 358; *Porter vs. Vorley*, 9 Bing., 93; *Whitworth vs. Davis*, 1 V. & B., 545; *Sloper vs. Fish*, 2 V. & B., 145; *Howard vs. Crowther*, 8 M. & W., 601, which was an action for seducing a servant; or on breaches of contracts having relation to the bankrupt's person, and the breach of which would affect him personally, and not by way of diminishing his personal estate—such, for instance, as a contract to marry him, or to cure him of a wound or disease.—*Drake vs. Beckham*, 11 M. & W., 315, overruling *Beckham vs. Drake*, 8 M. & W., 846. It does not seem to be necessary that the entire benefit of the contract should pass to the assignees. The question, as far as they are concerned, is whether they have any beneficial interest in the *vested cause of action*. It may be that there are various causes of action for breaches of the same contract, of which some might, and some might not, pass, *Boddington vs. Castelli*, 1 E. & B., 879; *Wetherell vs. Julius*, 10 C. B., 267, or contracts from which his estate can derive no possible advantage.—*Trott vs. Smith*, 12 M. & W., 688. Thus, the assignees were held entitled to sue on the breach of a contract to deliver a quantity of stone to the bankrupt at a certain price before his bankruptcy.—*Wright vs. Fairfield*, 2 B. & Ad., 727. And see *Hill vs. Smith*, 12 M. & W., 117. And a right of action for a wrongful dismissal from the bankrupt's situation in a type-foundry was held by the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer, to pass to the assignees.—*Beckham vs. Drake*, 11 M. & W., 315; 8 M. & W., 846; *Wetherell vs. Julius*, 10 C. B., 267. This decision subsequently underwent discussion in the House of Lords, *Beckham vs. Drake*, 2 H. L. Ca., 579, where the decision of the Court of Error, after consulting the judges (two of whom were of opinion that the right of action did not pass), was upheld. This, however, was principally on the ground that the agreement contained a stipulation for payment of five hundred pounds as a penalty for any breach, and the declaration was founded upon and claimed it. Parke, B., observes, "The proper and reasonable construction appears to me to be, that the statute transfers, not all rights of action which would pass to executors (for rights incapable of being converted into money pass to them), but all such as would be assets in their hands for the payment of debts, and no others; all which could be turned to profit, for such rights of action are *personal estate*. Of such the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee requires that he should have them also. But rights of action for torts, which would die with the testator, according to the rule '*actio personalis moritur cum persona*,' and all actions of contract affecting the person only, would not pass."

There are some cases in which the assignees may elect whether they will affirm a contract made with the bankrupt, and sue on it, or proceed in their own right in tort; for instance, where the de-

defendant sold the bankrupt's goods after an act of bankruptcy, and with notice of it, the assignees were allowed to sue for the price as money had and received to their use.—*King vs. Smith*, 2 T. R., 141; *Clark vs. Gilbert*, 2 Bing., N. C., 343. See *Gye vs. Hitchcock*, 4 Ad. & E., 84; *Russell vs. Bell*, 10 M. & W., 340, but could also have sued in trover for the goods. It was supposed that, where there is an express contract unperformed, they must make their election, to take advantage of it within a reasonable time, otherwise they might be treated as having abandoned it.—*Lawrence vs. Knowles*, 5 Bing., N. C., 399. See *Gibson vs. Carruthers*, 8 M. & W., 321. The effect of the assignees adopting the bankrupt's contract, and proceeding upon it, is to give the defendant every advantage deducible from its validity.—*Thorpe vs. Thorpe*, 3 B. & Ad., 580; *Bradbury vs. Anderson*, Tyrwh., 152; and as to what amounts to such an adoption, see *Valpy vs. Sanders*, 5 C. B., 886. The assignees, however, can not affirm the bankrupt's act in part, and repudiate it as to the rest.—*Brewer vs. Sparrow*, 7 B. & C., 310; *Wilson vs. Poulton*, 2 Str., 859.

The defendant, a merchant at Hull, kept an account at the Hull Bank, upon the terms that they should procure P. & Co., their London agents, to accept on their credit bills drawn by the foreign correspondents of the defendant against their consignments to him, and of which P. & Co. were advised by the Hull Bank. The defendant paid the Hull Bank a quarter per cent. on the amount of the acceptances, and they paid P. & Co. a fixed annual sum for transacting their London business. When a bill was accepted by P. & Co., the Hull Bank debited the defendant with the amount, and they charged him interest from the time the bill was due. The Hull Bank became bankrupt, and P. & Co. paid all bills accepted by them which were due after the bankruptcy. Held that the assignees of the Hull Bank, and not P. & Co., were entitled to recover from the defendant the amount of such bills.—*Barkworth vs. Ellerman*, 6 Hurl & Nor, 605.

Under the statute of Vermont, the right to recover back money paid by the debtor upon a usurious contract was held to be a right vested in property, which passed to and vested in the assignee under the bankruptcy of the debtor.—*Moore vs. Jones*, 23 Vermont, 8 Washb., 739. The right of a bankrupt to sue for, and recover back money paid by him as usury, is not such a right of property as vests in the assignee in bankruptcy. Although the statute has given a form of action in assumpsit, by which money so paid may be recovered, yet this remedy in legal contemplation is no less a mode of redressing an injury than if the action sounded wholly in tort.—*Nichols vs. Bellows*, 22 Verm., 7 Washb., 581. The English authorities establish that the assignees of a bankrupt may maintain an action to recover money lost by the bankrupt at gaming, and the provisions of the statute upon which such an action is founded are analogous to those of the Revised Statutes of the State of New York upon the subject.—Vol. i., chap. 20, art. 3; *Brandon vs. Pate*, 2 H. Black, 308.

**Conditional Estates.**—Estates given by deed or will to the bankrupt, but of which he is to become possessed upon the happening of a certain contingency, pass to the assignees; and the same rule applies to all estates created to commence upon the performance of a condition expressed. And where an estate has passed from the bankrupt, defeasible upon the performance of a condition, such as that created by a mortgage, or by his lands being extended under an elegit, the assignees have what may be termed the equity of redemption.

**Leases.**—The assignees are not bound to accept a term for years belonging to the bankrupt, for it might be burdened with rents and covenants beyond its value, and thus prove a loss instead of a benefit to the creditors. They may elect to take it; but until they have done some act to manifest their acceptance, the estate and interest remain in the bankrupt, subject to the right of the assignees to adopt it, *Tuck vs. Fyson*, 6 Bingh., 321, and he will remain liable to the rent, and chargeable on his express covenants. The liability of the bankrupt was provided against by the English Bankrupt Act, 12 & 13 Vict., cap. 106, § 145, which enabled the bankrupt, after the assignees had declined to accept any lease, or agreement for a lease, to deliver it up to the lessor, and thus protect himself from liability to the payment of the rent and the performance of the covenants subsequent to his bankruptcy; but there is no such provision in this act, a defect which will probably be remedied by future legislation.

**Assignees may be compelled to Elect.**—The lessor may call upon the assignees to elect, although the lease has been deposited, by way of equitable mortgage, with a third person.—*Ex parte Vurdy*, 3 Mont., D. & D., 340. Until election the term does not vest in the assignees.—*Copeland vs. Stephens*, 1 B. & A., 593. The remedy for the landlord is by petition or by motion, and the act enables the court to give him costs, see *ex parte Hopton*, 2 Mont., D. & D., 347; and *ex parte Bright*, 2 Glyn & J., 79; for it authorizes the court "to award costs in all matters before it." The assignees have a right to do reasonable acts for ascertaining the value of the lease, for they are not bound to assume any interest of the bankrupt which is not beneficial.—*Hope vs. Booth*, 1 B. & Adol., 505. As, for instance, merely advertising the lease without stating themselves to be the owners, and putting the premises up to sale without any bidding being offered, is not an election, *Turner vs. Richardson*, 7 East., 335; nor allowing the effects of the bankrupt to remain on the premises for nearly a year after the bankruptcy, and paying the rent due to prevent a distress, giving notice, at the same time, to the landlord of their intention not to take the lease unless it could be advantageously disposed of.—*Wheeler vs. Brahmah*, 4 Camp., 368. But a deliberate taking possession by the assignees will be an election to be tenants, although the bankrupt's effects remain on the premises, and after they are sold the keys are given up to the landlord.—*Hanson vs. Stevenson*, 1 B. & Adol., 303. So where they assume the management of the farm, *Thomas vs.*

Pemberton, 7 Taunt., 206, or enter the premises to complete contracts entered into by the bankrupt.—*Ansell vs. Robson*, 2 C. & J., 610; *Clarke vs. Hume*, 1 R. & M., 207. So where a bankrupt had a lease of the premises and a reversionary interest, the sale of his estate and reversionary interest by the assignees amounted to an election.—*Page vs. Godden*, 2 Stark., 309. The bankrupt is discharged from the covenants from the time of the assignees' election, and not from the date of the adjudication; and a surety for the lessee is also liable up to that time for breaches of covenant committed by the bankrupt.—*Tuck vs. Tyson*, 6 Bing., 321. A condition giving a right of re-entry on assignment without consent does not prevent the lessor from entering on the bankruptcy of the lessee, *Goring vs. Warner*, 2 Eq. Cas., Abr., 100; nor does it bind the assignees of the bankrupt, an assignment by whom is no forfeiture.—*Doe vs. Bevan*, 3 M. & S., 353. It is clear that, unless there be an express clause in the lease making an act of bankruptcy a determination of the lease, the bankruptcy of the lessee, and the consequent assignment under it, being proceedings *in invitum*, are not within the proviso against the assignment without license.—*Ex parte Sherman*, Buck, 462; *Doe d. Mitchinson vs. Carter*, 8 T. R., 57.

Parties may stipulate, by a special proviso, that the lease shall determine upon the bankruptcy of the lessee, *Roe d. Hunter vs. Galliers*, 2 Term Rep., 133; 15 Ves., 19 *id.*, 92, or upon the lease being taken in execution against the lessee.—*Doe d. Mitchinson vs. Carter*, 8 T. R., 57. See *Doe d. Floyd vs. Ingleby*, 15 Mel. & W., 465.

The assignees may assign the lease to any person, however irresponsible, and even for the very purpose of getting rid of their own liability, *Onslow vs. Corrie*, 2 Madd., 330; and if the bankrupt himself become their assignee, he will only be liable as such, and not as the original lessee.—*Doe d. Cheeres vs. Smith*, 5 Taunt., 795. By their refusal to elect, the term may be determined, and they will have the same rights as to the off-growing crop, etc., as the lessee would have had under the conditions of the lease.—*Ex parte*, Maundrell, 2 Madd., 315.

It was held in Pennsylvania that where the bankrupt had entered into a covenant to pay ground rent, that his discharge under his bankruptcy did not extinguish the claim for such rent falling due after his discharge.—*Bosler vs. Kuhn*, 8 Watts & Serg., 183. Vide "Bankrupt's Discharge," and notes.

A discharge under the Bankrupt Act of 1841 is not a bar to the recovery of rent which accrued after presenting a petition in bankruptcy upon a lease executed by the bankrupt as lessee for that time.—*Stimemet vs. Ainslie*, 4 Denio, 573.

**Foreign Property of the Bankrupt.**—Personal property has no locality, but is controlled by the laws which govern the person of the owner. It follows, therefore, that, unless there be a positive law to prevent it, the personal property of the bankrupt in all foreign countries passes to the assignees. They can sue for and recover debts in foreign courts, and their title duly and properly authenticated there will be recognized.

**Liens upon Property available against the Assignees.**—The assignees take the property of the bankrupt, subject to the liens legally and *bond fide* existing as against the bankrupt. Such liens exist by operation of statute law, by usage, or at common law. Under the former Bankrupt Act of 1841 many questions arose upon the subject of liens created by the laws of the several States under the process of *attachment*. That process had grown into a custom in many of the commercial cities of the world, and has now obtained a place in the juridical system of the mercantile communities of the United States. Recent statutory enactments of the several States have given a very wide scope to attachments, and executions upon judgments following attachments against the property of the debtor. The sheriff is authorized to seize, not only tangible property, but also money, choses in action, and evidences of debt. By the service of the attachment the plaintiffs acquire a *provisional* lien upon the property and credits of the debtors in their possession, which lien is established and made absolute by the recovery of the judgment. The judgment establishes the right of the plaintiffs to the satisfaction of their debt from the attached property of the debtor. The execution is but a continuance of the attachment lien, with authority to the sheriff to convert the assets levied upon into money in the mode prescribed by law, and apply the same in satisfaction of the final judgment.

Many questions arose upon the subject of the attachment of goods of a bankrupt before the bankruptcy under the various processes of attachment in the different States. It was held in Vermont that an attachment of property upon *mesne process*, if perfected by judgment and levy, is a lien, which is protected by the Bankrupt Act; and it is immaterial whether the judgment is recovered before, pending, or after the proceedings in bankruptcy.—*In re Reed*, 21 Vt., 6 Wash., 635.

Where property had been attached upon *mesne process*, and after judgment had been obtained, the right of the attaching creditor attached absolutely to the property, and by the law of Massachusetts remained a fixed and permanent lien for thirty days after the judgment, by means of which the creditor, at his election, might obtain a preference of satisfaction out of the property attached over all other creditors. And it was held under the former Bankrupt Act that, under the decree of bankruptcy, all property and rights of property of the bankrupt are divested from him, and vest in the assignees as soon as they are appointed; and such decree relates back to the date of the petition; consequently, pending the proceedings in bankruptcy, an attaching creditor was not permitted to proceed in his suit against the bankrupt to trial and judgment, because there can be no party defendant properly before the court.—*Ex parte Foster*, 2 Story, 131. Vide also 2 Story, 376. And it was by the same case decided that where a writ of attachment from the State Courts had issued against the goods of a debtor, who immediately afterward petitioned for the benefit of the Bankrupt Act, and was declared bankrupt, the court, upon the petition of the debt-



or, allowed the action to be continued, but would not allow the attaching creditor during the proceedings in bankruptcy to proceed to trial and judgment in the suit.

An attachment by a creditor previous to the decree of bankruptcy, but with notice of an act of bankruptcy having been committed by the debtor, or of his intention to take the benefit of the Bankrupt Law, was a fraud upon the law, and would not create a lien protected by it. The pendency of the petition in bankruptcy was of itself notice, so as to avoid any attachment made after the filing of the petition, and proof of actual notice avoided an attachment made before.—*Howes vs. Spaulding*, Circuit Ct., 1844. Vide also *Downer vs. Brackett*, 21 Vt., 6 Washb., 599.

Under the Bankrupt Law of 1841 all liens which were valid by the laws of the States respectively were preserved, unless the persons holding them came in and proved their claims, and asked *pro rata* their share of the bankrupt's effects.—*Wooten vs. Clark*, 23 Miss., 1 Cush., 75.

The assignees of a bankrupt took his property, subject to all liens to which it was subject in the hands of the bankrupt, though they had no notice of such liens.—*Clason vs. Morris*, 10 John. Rep., 524.

Attachments existing under State laws were discharged in cases where the demand in suit could be proved under the bankruptcy.—*Payson vs. Payson*, 1 Mass., 200; *Flagg vs. Tyler*, 6 Mass., 36; *Harrison vs. Sterry*, 5 Cranch, 301.

By the Bankrupt Law of 1841 the liens of judgments were continued in full operation, and the rights of the creditor protected, according to the laws of the State, till the liens expired by limitation. The estate then vested in the bankrupt's assignee.—*Bruner vs. Sherley*, 27 Miss., 5 Cush., 407.

The lien of a creditor's bill was not dissolved by the subsequent bankruptcy of the debtor, according to the provisions of the Bankrupt Law, and his assignee in bankruptcy took his things in action, subject to such lien.—*Storm vs. Waddell*, 2 Sanford, Chan. Rep., 494.

The assignees, having the right to discharge encumbrances on the bankrupt's estate, may file a bill against all encumbrancers, to ascertain the validity, priority, and amount of their several claims.—*M'Lean vs. Lafayette Bank*, 3 M'Lean, 587.

**Property of the Bankrupt attached on Mesne Process within four Months next preceeding the Bankruptcy.**—In order to remedy the difficulties which had arisen upon this subject, and to prevent fraud and collusion between the debtor and a favored creditor, this section provides, That any attachment *on mesne process* which has been issued against the property of the bankrupt within the time above limited is to be dissolved, and the property which has been so attached is to vest in the assignees as a portion of the bankrupt's estate. The English Bankrupt Acts have analogous provisions. The 12 and 13 Vic., chap. 106, § 133, makes valid all executions and attachments against the goods and chattels of any bankrupt *bond fide* executed and levied by *seizure and sale* before the date of the bankruptcy or the filing of the petition, provided the person at

whose suit or on whose account such execution or attachment shall have issued had not, at the time of executing or levying such execution or attachment, or at the time of making any sale thereunder.

*Notice of any previous Act of Bankruptcy committed by the Bankrupt.*—The effect of this section, therefore, is absolutely to defeat all attachments issued against the property of the bankrupt within four months before the bankruptcy where the plaintiffs have not obtained judgment in such attachment suit.

A lien is construed to be a right to retain property until a debt due to the person retaining has been satisfied. It is not incompatible with a right on the part of the person claiming it to sue for the same debt; but he is allowed to do so, retaining his lien as collateral security. There are two species of liens known to the law—*Particular and General*. Particular Liens are when persons claim to retain the goods in respect of which the debt arises, and these are favored by the law. General Liens are claimed in respect of a general balance of account, and these are to be taken strictly. Where a lien exists, it is available, although the debt for which the party retaining claims to hold the goods be of more than six years' standing, and the remedy by action at law barred in consequence by the Statute of Limitations. The goods, while they continue in the possession of the person entitled to a lien, can not be seized in execution for the real owner's debt.

The doctrine of lien originated in certain principles of the common law, by which a party who was compelled to receive the goods of another was also entitled to retain them for his indemnity; thus carriers and innkeepers had by the common law a lien on the goods intrusted to their charge.—*Skinner vs. Upshan*, Lord Raym., 752. The rescuer of goods from perils of the sea has, on grounds of public policy, a lien at common law for salvage; and it is a principle that, where an individual has bestowed labor and skill in the alteration and improvement of the subject delivered to him, he has a lien on it for his charge. Thus a miller and a shipwright, *Ex parte Ockenden*, Atk., 235, have each a lien; so has a trainer for the expense of keeping and training a race-horse, *Bevan vs. Waters*, M. & M., 236; for he has, by his instruction, wrought an essential improvement in the animal's character and capabilities, unless by usage or contract the owner has a right inconsistent with it, as, for instance, of sending the horse to run for any race he pleases, and selecting the jockey to ride him.—*Forth vs. Simpson*, 13 Q. B., 680. But here the rule appears to stop, and not to include cases wherein expense has been bestowed upon the object claimed to be retained, without producing any alteration in it.—*Stone vs. Lingwood*, 1 Str., 651. Thus it has been decided that a livery-stable keeper has no lien for the keep of a horse, *Wallace vs. Woodgate*, R. & M., 193, nor an agistor of a horse or cow, *Jackson vs. Cummins*, 5 M. & W., 342, for its agistment. Such is a description of a lien at common law. Whenever one of any other kind is sought to be established, the claim to it is not deduced from principles of common law, but founded upon the agreement of the parties, either expressed or to

be inferred from usage, *Naylor vs. Mangles*, 1 Esp., 109, and will fail if some such contract be not shown to have existed.—*Pratt vs. Vizard*, 5 B. & Ad., 108.

**By Special Agreement.**—With respect to liens by express agreement little need be said; the question whether one has or has not been created, depends upon the special terms of each individual contract. Where the intention of the parties to create one is plain, there can be no doubt of their legal right to carry it into effect, *Small vs. Moates*, 8 Bing., 574; and as they can deal as they please with their own property, they may of course frame their contract so as to exclude the right of lien, as well as to create or to extend it; and this may be done either by direct words, or the insertion of some stipulation incompatible with the existence of a right of lien, *Owenson vs. Morse*, 7 T. R., 64, or a similar usage of trade consistent with, and incorporated by implication into the contract.—*Raitt vs. Mitchell*, 4 Camp., 146. Indeed, it once was thought that wherever there was an agreement for the payment of a fixed sum, the right of lien must be taken to have been abandoned.—*Brennan vs. Currant*, Say. R., 224. But this doctrine, which seems unreasonable, has been overruled; and the rule now is, that the mere existence of a special agreement will not, of itself, exclude the right of lien, but that, if any of its terms be inconsistent with such right, it will do so.—*Chase vs. Westmore*, 5 M. & Sel., 180.

**Lien by Usage.**—As to liens resulting from usage, these depend upon *implied*, as those last upon *express* contract.—*Rushforth vs. Hadfield*, 6 East., 519. The usage whence such an agreement may be implied is either the common usage of trades, or that of the parties themselves, in their previous dealings with each other.—*Holderness vs. Collinson*, 7 B. & C., 212. Of this description are most *general liens*, none of which existed at common law, but all depend upon the agreement of the parties themselves, either expressed, or to be inferred from their previous dealings, or from the usage of trade and the decisions of the courts of law thereon.—*Leuckhart vs. Cooper*, 3 Bing., N. C., 99. It has been settled that an attorney has a lien for his general balance on papers of his clients which come to his hands in the course of his professional employment.—*Stevenson vs. Blakelock*, 1 M. & Sel., 535. So a banker who has advanced money to a customer has a lien for his general balance, *Davies vs. Bowsher*, 5 T. R., 488, upon securities belonging to such customer which come into his hands, but not on muniments pledged for a specific sum, *Vanderzee vs. Willis*, 3 Bro. C. C., 21, or left casually at his bank after his own refusal to advance money on them, *Lucas vs. Dorrien*, 7 Taunt., 278, or negotiable instruments belonging to a third person, left in the banker's hands by his customer.—*Brandas vs. Barnett*, 1 M. & Gr., 908. So it has been determined that calico-printers, *Weldon vs. Gould*, 3 Esp., 268, dyers, *Savell vs. Barchard*, 4 Esp., 53, and wharfingers, *Naylor vs. Mangles*, 1 Esp., 109, have liens for their general balance.—*Rose vs. Hart*, 8 Taunt., 499, 2 B. Moore, 547. However, notwithstanding these decisions, it does not appear certain that the right of lien may not, even with

respect to some of the above trades, be hereafter contested, for the English courts have remarked with respect to wharfingers that there may be a usage in one place varying from that which prevails in another.—*Holderness vs. Collinson*, 7 B. & C., 212. The party, therefore, claiming to retain goods for a general balance, should, in almost every instance, be prepared with evidence of the usage applicable to his own case. It is, however, established too well for dispute that a factor has a lien upon all goods in his hands *as factor*, *Dixon vs. Stansfield*, 10 C. B., 398, for the balance of his general account, *Houghton vs. Matthews*, 3 B. & P., 485, and even on the *price* of those with the possession of which he has parted. Thus where A consigned goods to B, a factor, to whom he owed more than their value, and B sold them to C, to whom he was himself indebted, the factor having become bankrupt, it was decided that he had a lien on the whole price due from C, which must consequently be placed to the credit of his assignees in winding up his account with C, and that A was not entitled to any portion of it.—*Hudson vs. Granger*, 5 B. & Ald., 27. But a factor has not a lien for debts which accrued before his character as such commenced.—*Houghton vs. Matthews*, 3 B. & P., 485. Policy brokers have also a general lien, and may avail themselves of it to obtain payment of the balance due to them from their employer, though he be merely an agent, if he did not disclose his principal, *Mann vs. Forrester*, 4 Camp., 60, but not if they knew, or there is enough to indicate to them his representative character.—*Maans vs. Henderson*, 1 East., 335. Whether carriers have, by the usage of trade, a general lien, is a matter which has been of late years a good deal disputed.—*Rushforth vs. Hadfield*, 6 East., 519. The prevailing opinion seems to be that they have. But the master of a ship has no lien on the vessel or her freight, either for his wages or disbursements on her account.—*Hussey vs. Christie*, 9 East., 426.

As a lien is a right to *retain* possession, there can be no lien where the possession of the goods has once been abandoned—the lien is then gone; but when the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for the freight.—*Wilson vs. Kymer*, 1 M. & Sel., 157. And where they are not required to be landed at any particular dock, the common practice is to land them at a public wharf, and direct the wharfinger not to part with them till the charges upon them are paid.—*Abbott on Shipping*, 377, 8th ed. In such case the wharfinger is the ship-master's agent, and the goods remain in the constructive possession of the latter. But otherwise, the rule concerning possession is so strict that, if a party, having a lien on goods, cause them to be taken in execution at his own suit, and purchase them, he so alters the nature of the possession that his lien is destroyed, though the goods may never have left his premises.—*Jacobs vs. Lawton*, 5 Bing., 130. And if, when the goods are demanded from him, he claims to retain them on some different ground, and makes no mention of his lien, he will be considered as having waived it, and the owner of the goods may

sue him without tendering a satisfaction for the debt which created his lien. *Boardman vs. Sill*, 1 Camp., 410, n. For it is to be remembered that, in all cases, the owner of the goods, on tendering such satisfaction, has a right to his own property; and if the creditor refuse, after such tender, to restore it, he does so at his peril; for if the tender were sufficient in amount, he is a wrong-doer, and answerable for his misconduct in an action. Nor, indeed, is an actual tender, strictly so called, necessary, if the person in whose possession the goods are have signified his refusal to accept the amount really due.—*Jones vs. Tarleton*, 9 M. & W., 675. Moreover, the possession must be lawful; a creditor can not tortiously seize upon his debtor's goods, and then claim to retain them by virtue of a lien.—*Taylor vs. Robinson*, 2 Moore, 730. So if he abuses the goods, as, for instance, by pledging them, his lien is forfeited.—*Scott vs. Newington*, 1 M. & Rob., 252.

If a security is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone. *Cowper vs. Green*, 7 M. & W., 633. So, too, if the parties come to a new arrangement, and agree that the debt shall be paid in a particular manner. But a mere right of set-off to an amount equal to that for which the lien is claimed does not alter it; for in that case there are two parties having mutual claims on one another, with this difference, that one has a security, and the other has not; and, in the absence of special agreement to that effect, it would be obviously unjust to deprive the former of his advantage.—*Pinnock vs. Harrison*, 3 M. & W., 532; 4 B. & Ad., 408.

**Mortgages.**—All the interest of the bankrupt as mortgagor or mortgagee, either of real or personal property, passes to his assignees, and all his right of redeeming such property or estate by the express provision of the section. The assignees have express power to redeem or discharge any mortgage upon any real or personal property "*whenever payable*," and to tender due performance of the conditions thereof, and to sell the same subject to such mortgage. The assignees have a power under the act which the bankrupt does not possess, as they may perform the contract or stipulation, as to payment, by anticipation; but it gives them no other power than the bankrupt had of performing it *after* the day of payment.—*Dunn vs. Massey*, 6 Ad. & E., 479.

Between a mortgage of land, and a mortgage or pledge of goods, this distinction must be observed—that the mortgagor of lands may retain possession of them without affecting the security; but a mortgage or pledge of goods may be deemed a nullity, as against assignees, if there has been no *bond fide* change of possession. However, there are many cases in which, although the mortgagor of movable chattels does not remain in possession of them, it may be impossible to give the actual manual occupation of them to the mortgagee; as, for instance, in the case of a ship at sea, which, however, may be transferred in the manner pointed out in the statutes on the subject. In the case of goods in transit on board of a

ship at sea, in which case the transfer of the bill of lading will be deemed a legal transfer of the goods, *Meyer vs. Sharpe*, 5 Taunt., 74; also of goods in bond, in which case a transfer of the usual mercantile documents will be deemed a legal transfer of the goods. This section will not enable the assignees to revest in them the legal estate in mortgaged premises by payment, or tender of what is due on the mortgage, after the estate of the mortgage has become absolute by non-payment on the day limited by the proviso of redemption, *Dun vs. Massey*, 1 Nev. & P., 578; 6 Ad. & E., 479; and in the case of mortgages by a bankrupt, equity will supply a defect in the conveyance, as against the assignees, in the same manner as in other cases.—*Russell vs. Russell*, 1 Bro., 269.

But equity has refused to make good the mortgage of a ship, which was defective, the regulations in the register acts not having been complied with.—*Ex parte Bulteel*, 2 Cox, 243.

A mortgage, or other conveyance of a conditional estate, to be valid must have been executed so as to affect the estate before the bankruptcy.—1 P. W., 62; *Meyer vs. Sharpe*, 5 Taunt., 74. Where the bankrupt has executed several distinct mortgages of different estates to the same mortgagee, the assignee can not redeem one mortgage without also redeeming the others.—2 Vern., 286; 2 Mont., D. & D., 328.

**Redeemable personal Property.**—The assignees have power to redeem any property which has been deposited, hypothecated, or pledged by the bankrupt before his bankruptcy; and, as observed in the note to "*mortgages*," they can exercise that power before the day of payment stipulated in the contract, or by the terms of the deposit or pledge, has arrived.

**Property in Right of the Wife.**—Whatever beneficial interest the bankrupt has in the wife's property passes to the assignees. But a Court of Equity, if its assistance is required to realize such interest for the benefit of the bankrupt's estate, will protect the interest of the wife and children, and impose terms upon the assignees by stipulating that a provision be made for her and her children out of the fund.—*In re Cutler's Trust*, 20 L. J. Chancery, 504; *Lloyd vs. Mason*, 5 Hare., 149.

The property of a bankrupt's wife, whether legal or equitable, and whether coming to the husband upon or after marriage, passes to his assignees. They take the rents and profits of her real estate during coverture, her personal chattels in possession absolutely, her chattels real, and choses in action, mortgages, debts, and legacies, so far as they vested in him or could be disposed of by him. Thus a contingent remainder in personalty bequeathed to the wife passes, although it be subject to a life interest which does not fall in until after the bankrupt obtains his certificate.—*Doe vs. Steward*, 1 Ad. & E., 300; *Ripley vs. Woods*, 2 Sim., 165. If, however, the property be settled, or a gift inures to the separate use of the wife, then the assignees take nothing, because the bankrupt had no equitable interest therein.—*Tullet vs. Armstrong*, 4 Mylne & C., 377. A Court of Equity will exercise the same jurisdiction to obtain a

settlement for the wife and children against the assignees as against the husband; and there is no rule of law or practice to prevent the whole residue of a wife's fortune being settled upon her and her children, it being a matter purely in the discretion of the court.—*Dunkley vs. Dunkley*, 16 Jurist, 767. If, however, the assignees do not reduce a chose in action belonging to the wife into possession during the husband's life, her right of survivorship is not affected by the bankruptcy.—*Hornsby vs. Lee*, 2 Madd., 16; *Ryland vs. Smith*, 1 Mylne & C., 53. It was so held, although the husband's death took place pending a suit by the assignees to reduce the chose in action into possession.—*Pierce vs. Thornely*, 2 Sim., 167.

A promissory note given to a married woman for a debt due her before her marriage, although not reduced into possession by her husband, passed, under the Bankrupt Act of 1841, to the assignees; and a subsequent indorsement of the note by the husband and wife will not enable the indorsee, who has notice of the circumstances, to maintain an action on the note, without the consent of the assignee in bankruptcy.—*Smith vs. Chandler*, 3 Gray, Mass., 392. Where, however, by the laws of any State a married woman may possess real estate and personal property, free from the control of her husband, such property would not pass to the assignees in the event of his bankruptcy.

**Real Estate.**—This includes not only estates in possession, but also estates in remainder and reversion. Even a mere possibility of right will pass to the assignees.—*Hidden vs. Williamson*, 3 P. Williams., 182. But a possibility that lands will come to the bankrupt as heir at law by descent, if they do not actually descend to him before he obtains his discharge under the bankruptcy, will not pass to the assignees.—*Carleton vs. Leighton*, 3 Merivale, Appendix, 667. Estates given by deed or will to the bankrupt, but of which he is to become possessed upon the happening of a certain contingency, pass to the assignees; and the same rule applies to all estates created to commence upon the performance of a condition expressed.

**Property of Bankrupt Partner.**—The general rule in cases of bankruptcy is, that when one partner becomes bankrupt, his assignees can take only that portion of the partnership assets which would belong to the bankrupt after payment of all the partnership debts; and that the solvent partners have a lien upon all the assets of the firm, for the debts of such firm, and for their own shares thereof, before the separate creditors of the firm can come in and take any thing.—*Parker vs. Muggridge*, 2 Story, 334.

For the purpose of ascertaining and settling the partnership debts and assets, it may be necessary that the District Court should take into its own hands the exclusive management of all the partnership assets, and prohibit the other partners from interfering therewith. But a Court of Equity will be scrupulous not to displace any of the solvent partner's rights or equities, but will maintain and protect them.

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The assignees of a bankrupt partner brought a suit in equity to recover partnership property, to which the solvent partner, who was made a party to the suit, demurred, on the ground that the assignees of one partner were not entitled to recover joint property. The demurrer was overruled, and an account was taken before the master and finally settled. Held, that the solvent partner could not, in a collateral suit, question the right of the assignees to the property so recovered, though the decree, in the suit by the assignees, reserved to the solvent partner a right to question their claim; and a solvent partner could not call upon the assignees of a bankrupt copartner, or the partnership debtors, who have *bond fide* settled with the assignees, to account for the partnership property, in order to get possession of the property for the purpose of distribution among the partnership creditors. The right of the assignees to distribute the fund is equal to his at law, and superior to it in equity.—*Murray vs. Murray*, 5 John, C. R., 60.

Where all the partners of a firm have been adjudicated bankrupts, the whole of the joint property of such firm, and of the separate property of each of its members, is to be administered under such bankruptcy, and passes to the assignees when appointed. But where *one partner* of a firm is adjudicated bankrupt, the property to be administered by his assignees consists of his separate estate and interest in such firm, and his assignees are to administer such part of the joint property as the bankrupt himself would have been entitled to had he remained solvent. The bankruptcy operates as a dissolution of the partnership, and the assignees of the bankrupt partner become tenants in common with the solvent partner of the partnership effects, and hold the bankrupt's undivided share thereof, subject to the state of the partnership accounts.—*Morgan vs. Marquis*, 9 Exch. Rep., 145; *Lewis vs. Edwards*, 7 M. & W., 300; *Taylor vs. Field*, 4 Ves., 396.

Hence it follows that, in case of the bankruptcy of *one member* of an entire firm, it is necessary to take an account of the whole state of the partnership affairs, in order to ascertain what property and what interest of the bankrupt partner is to be administered by the assignees under his bankruptcy; and, in case of the bankruptcy of an *entire firm*, it is also necessary to take such an account, in order to ascertain how all the assets of such firm are to be administered.—*Dutton vs. Morrison*, 17 Ves., 209; *Barker vs. Goodair*, 11 Ves., 85; *ex parte Farlon*, 1 Rose, 421. Vide Section 36, "Bankruptcy of Partnerships," and notes.

**Property of the Bankrupt acquired after his Bankruptcy.**—The assignees take not merely the bankrupt's present property, but also that which may accrue to him at any time previously to obtaining his discharge.—*Ex parte Ansell*, 19 Ves., 208; 7 Tenn. Rep., 296. He has, however, an interest in such future property, subject to their right, and is entitled to recover it from strangers if the assignees do not interfere.—*Tyson vs. Chambers*, 9 M. & W., 460; *Herbert vs. Sayer*, 5 Q. B., 965; *Drayton vs. Dale*, 2 B. & C., 293. The assignees have the right to interfere, even after the bankrupt has com-



menced an action to recover such property.—*Crofton vs. Poole*, 1 B. & Ad., 568. They have no right to the labor or personal earnings of the bankrupt, for that would deprive him of the means of subsistence, and it has been decided that a bankrupt might recover a compensation for such labor against his assignees, who had themselves employed him.—*Williams vs. Chambers*, 10 Q. B., 337. The rule appears to be that the profits of the *personal* industry of the bankrupt, between the bankruptcy and the discharge, do not pass to the assignees; but where the bankrupt, after his bankruptcy and before his discharge, is substantially carrying on any business, either with capital, or in any other manner not entirely depending upon his personal exertions, the debts contracted with him in respect of such business or trade are claimable by the assignees if they so elect. It was held, under the United States Bankrupt Act of 1841, that all the acquisitions of a bankrupt, made after the filing of his petition in bankruptcy, are exempt from liability to pay debts previously contracted.—*Bond vs. Baldwin*, 9 Geo., 2.

**Property conveyed by the Bankrupt in fraud of his Creditors.**—The section specifically vests in the assignees all property which has been conveyed by the bankrupt in fraud of his creditors. The definition of a fraudulent conveyance will be found in express terms in the 35th Section of this act. Vide notes to that section, and also title "Fraudulent Preferences." But, in addition to such definition, any conveyance by a bankrupt which under the circumstances would be deemed fraudulent, would be void as against the assignees, and the property thus conveyed by the bankrupt would vest in them.

Under the former Bankrupt Act of 1841 it was held that lands conveyed to a third person by the bankrupt without any consideration, upon a secret parol trust in his favor, for the purpose of defrauding creditors, passed to the assignees, although the conveyances were made before the passage of the act.—*Carr vs. Hilton*, 1 Curtis, Ct. Ct., 230.

**Stocks and Shares in Public Companies.**—All vest in the assignees, whether standing in the name of the bankrupt, or in the name of any third person in trust for him, and all title to the dividends and interest thereof, and all his interest connected therewith. The last English Bankrupt Act contains provisions applicable to the case of a bankrupt entitled to the stock of any public company, and empowers the court to order all persons whose act or consent is necessary thereto to transfer the interest of the bankrupt in such stock into the names of the assignees, and to pay all the dividends upon such stock, shares, etc., to them.—12 & 13 Vic., chap. 106, § 128. Without such a provision the same object will be accomplished by this act.

Where the shares or stock are standing in the name of the bankrupt, he can be compelled by an order of the court to make all such transfers as are necessary to vest them in his assignees; and where such stock or shares are standing in the name of a third person, the court can, by injunction, prevent such person from receiving the

dividends and interest, if such shares or stocks properly belong to the bankrupt. The assignees may elect whether they will take such shares under the bankruptcy or not; but, until acceptance by the assignees, the bankrupt will remain liable for all future calls, installments, or contributions. The case of the South Staffordshire Railway Company vs. Burnside, 5 Exchq., 129; 20 L. J. Exchq., 120, explains the English law upon this subject, and may be referred to as laying down principles which may guide the decisions of the American courts upon *cognate questions*.

**As to the time from which the Bankrupt's Property vests in his Assignees.**—Subject to the qualifications and exceptions introduced by the act, it is a fundamental rule and principle of the Bankrupt Law that the title of the assignees has relation back to the act of bankruptcy. To avoid the many difficulties which constantly arose under the English Bankrupt Acts upon the question of when an act of bankruptcy had been committed by the debtor, and at what date therefore the property of such bankrupt vested in his assignees, this section declares that the assignment to be executed to the assignee shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title of the assignees to the bankrupt's property relates back to that period. In *voluntary bankruptcy*, the filing of the petition by the debtor is the commencement of the proceedings; in *involuntary or compulsory bankruptcy*, the filing of the petition for adjudication by the creditors is the commencement of the proceedings.

The assignees have, it is true, no title until their appointment; but when appointed, their title is retroactive, and relates back, as has been before observed, to the commencement of the proceedings in bankruptcy.

**Property protected by the Act.**—Mortgages of vessels, or of any other goods or chattels, made as security for any debt or debts, *in good faith* and *for present considerations* and otherwise valid, and duly recorded in pursuance of any statute of the United States, or of any State, are excepted by this section; and if such securities comply with the conditions of the section, they are not to be invalidated or affected by the bankruptcy.

**Property not vesting in the Assignees—Trust Property.**—The section expressly declares that no property held by the bankrupt *in trust* shall pass by such assignment. Independently, however, of this enactment, property held by the bankrupt in trust for others would not pass to his assignees, since it would be in no wise available for the purpose of the Bankrupt Laws. The English Bankrupt Act, 12 and 13 Vict., chap. 106, section 130, provides: "That where a bankrupt is possessed, as trustee, of any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, it shall be lawful for the lord chancellor, on the petition of the person entitled in possession to the receipt of the rents, dividends, interest, or produce thereof, to order the assignees

to convey, assign, or transfer the said estate, interest, and stock, etc., to such person as the lord chancellor shall appoint, upon the same trusts as the said estate, interest, stock, etc., were subject to before the bankruptcy." This section, however, providing that no property held in trust by the bankrupt passes to the assignees, will render any such proceedings unnecessary, and upon the bankruptcy of a trustee, the assignees taking no interest in the trust property, a Court of Equity would decree the appointment of another trustee. —*Ex parte Smith*, 4 Deac., 214.

**Bankrupt Executor or Administrator.**—Property in the possession of the bankrupt as executor or administrator does not vest in his assignees; and money, if it can be specifically distinguished and ascertained to belong to the testator or intestate, and not to the bankrupt, does not pass.—*Ludlow vs. Browning*, 11 Mod., 138. A Court of Equity, upon application, will secure effects in the hands of a bankrupt as executor or administrator, and if taken possession of by the assignees, will appoint a receiver, to whom the assignees must account.—*Ex parte Tupper*, 1 Rose, 179; *ex parte Butler*, 1 Atk., 213.

**Property in the Possession of the Bankrupt as Factor, Broker, or Agent.**—Goods in the possession of the bankrupt at the time of the bankruptcy, as factor or broker of another, will not pass to the assignees.—*Whitfield vs. Brand*, 16 M. & W., 282. If the bankrupt has sold the property on account of the owner, the latter may sue the vendee for the price, if he has not paid it to the bankrupt. If the bankrupt has sold the goods and received the price in cash before his bankruptcy, the owner must come in with the other creditor, and prove for the amount.—*Scott vs. Surman*, Willes, 400. Or if the bankrupt has taken bills or notes for the amount of the goods sold by him, the owner is entitled to them.—Same case *supra*. If the price received for goods sold by the bankrupt, as factor or agent of another, has been specifically set apart by the bankrupt *bond fide* before his bankruptcy, or securities received for the amount from the vendee when they can be identified and distinguished from other property, such goods will be deemed the property of such owner, and will not pass to the assignees.

**Debts which have been Assigned.**—All debts and other claims or rights which have been *bond fide* assigned by the bankrupt before his bankruptcy will not vest in the assignees.

**Property specifically Appropriated.**—Property in the hands of others, which the bankrupt has *bond fide* before his bankruptcy specifically appropriated, will not pass to the assignees. When the bankrupt before the bankruptcy gave one of his creditors an order on the executor of his debtor to pay the debt to the creditor, and the executor received the order, and detained it until he received sufficient assets, the creditor was held entitled to recover the debt.—*Ex parte Smith*, 3 Spons., 392; *Bedford vs. Perkins*, 3 Car. & P., 90. When a merchant had advanced money to a trader, upon an agreement that the trader should consign a cargo to A B for sale, and that A B should remit the proceeds through the medium of

the merchant, in order that he might secure himself for the advances made, the cargo was consigned, but the trader afterward wrote A B, informing him that the cargo was not responsible for the advances of the merchant. A B, however, remitted the proceeds to the merchant. The trader having become bankrupt, his assignees brought an action against A B to recover the proceeds of the cargo. It was held that they could not recover, because the trader had specifically appropriated the proceeds of the cargo for the payment of the advances, and which appropriation he could not afterward rescind.—*Fisher et al. vs. Miller*, 1 Bing., 150.

Where a trader consigned goods to a merchant abroad, who was to remit the proceeds to his agent in England for the trader, and the trader drew bills upon the agent to the value of the consignment, who accepted them, under a promise by the trader to provide for them if the proceeds should not be remitted to him in time. After the bills were accepted, and before the remittance of any proceeds, the trader became bankrupt, after which the agent received the proceeds and paid the bills. It was held that the assignees had no right to recover the value of the proceeds, these proceeds having been specifically appropriated to the payment of the bills by the bankrupt before his bankruptcy.—*Thomas vs. De Costa*, 2 Moore, 336. Vide also *Waller et al. vs. Drakeford*, 1 Stark, 481.

Where a trader, before his bankruptcy, being indebted to a creditor, requested a third person, who was his debtor, to pay the amount of his debt to such creditor, which the debtor engaged to do as soon as the amount was ascertained; but before the payment of the amount the trader became bankrupt. It was held that these circumstances amounted to an equitable assignment of the debt and goods as against the assignees.—*Cornfoot vs. Gurney*, 9 Bing., 372. But a mere general agreement, or mere direction by a principal to his agent to pay over moneys, will not, without further circumstances, amount to a specific appropriation, and divest the assignees of their right to recover. Where money has been placed under the control of an arbitrator for a specific purpose to which it has been applied, such money can not be recovered back from him by the assignees, on account of a previous act of bankruptcy of which the arbitrator had no notice.—*Tope vs. Hockin*, 7 B. & C., 101; *Coles vs. Wright*, 4 Taunt., 198. Where agents sold goods of their principal to a trader who paid for them by a bill of exchange drawn by the trader upon a third person, and the goods so purchased remained in the hands of the agent for sale on behalf of the trader, but before the bill became due the acceptor failed, and the agent having applied to the trader for security, he gave a written order to sell the goods and apply the proceeds to the payment of the bill, but before the sale was effected the trader became bankrupt. It was held that the goods remained in the hands of the agent, subject to the charge created by the bankrupt for the payment of the bill, and that the assignees could not recover the goods or their value.—*Bailey vs. Culverwell*, 8 B. and C., 448. Where a trader, having shipped goods for a foreign port, and, as collateral

security for bills drawn upon and accepted by A B, lodged with him the bills of lading, but without indorsing them; the ship was prevented going to the foreign port by an Order in Council; in the mean time the trader became bankrupt, and one of his creditors got possession of the goods and sold them. It was held that A B was entitled to the produce of the sale, the goods having been specifically appropriated to the payment of his acceptances by the bankrupt before his bankruptcy.—Favence and others vs. Hullett and others, 1 Camp., 554. And this rule applies in all cases where property is clothed with a *bond fide* and specific trust, of the exemplification of which rule the cases before cited afford instances. Wherever proceeds of a cargo or other property have been charged by the bankrupt before his bankruptcy with a specific trust, the conditions of which have been performed, or the liability for the performance of which has been incurred before the bankruptcy, the assignees have no right to recover such property.

**Property in the Possession of the Bankrupt for a particular Purpose.**—Property of another in the possession of a bankrupt at the time of the bankruptcy for a particular purpose, for instance, in the hands of a manufacturer for improvement or repair, or a ship in the hands of a ship-builder in the course of construction, will not pass to the assignees.—Clarke vs. Spence, 4 Ad. & E., 448.

**Property under Contract, but not accepted.**—The assignees are not entitled to goods delivered by the bankrupt before the bankruptcy, although not in fact accepted until afterward, Bartram vs. Fairbrother, 4 Bing., 579, nor to goods ordered or purchased by the bankrupt, if he has not the right of possession as well as the property. Thus a vendee requires a right of *property* by the contract of sale, but no right of *possession* until he pays or tenders the price, and, therefore, the assignees can not in such case maintain trover for the goods, although they might adopt the contract, which is still *in fieri*, and sue for its non-performance, on the assignees themselves performing all that the bankrupt was bound to perform as precedent or contemporaneous conditions.—Gibson vs. Carruthers, 8 Mees & W., 321; Bloxham vs. Sanders, 4 B. & C., 941.

**Goods in Transitu.**—The assignees have no right to goods stopped *in transitu*, because the buyer has not the indefeasible right to the possession, although he has the right of property, and his insolvency without payment puts an end to his right of possession, or rather clothes the vendor with the right of resuming the possession.—Bloxham vs. Sanders, 4 B. & C., 949; Smith's Leading Cases, 432.

**Interest of the Bankrupt's Wife not passing to the Assignees.**—It was held under the Bankrupt Act of 1841, that a legacy to a bankrupt's wife dependent on her surviving another person, being a mere possibility, did not pass to the assignees of the husband.—Krumbaar vs. Burt, 2 Wash., C. C., 406.

The general assignment in bankruptcy had not the effect of reducing into possession a legacy of stock, in trust for the bankrupt's wife, whose right by survivorship was established against the assignees.—Mitford vs. Mitford, 9 Ves., 87.

If the wife of a bankrupt has an interest in a legacy, and the assignees file a bill to compel payment, and the husband dies before any decree is made, the widow, and not the assignees, is entitled to the legacy.—*Pierce vs. Thornely*, 2 Sim., 167; see *Ryland vs. Smith*, 1 Mylne & C., 53.

**Claim by the Bankrupt upon a foreign Government.**—It was held under the Bankrupt Act of 1841, that a claim for spoiliations by Spain on the bankrupt's property was not assignable, and the assignees, having received the amount of such claim awarded to them by commissioners under the treaty between Spain and the United States, were held liable to the bankrupt therefor in an action for money had and received to his use.—*Vasse vs. Comegys*, 4 Wash., C. C., 570.

**Pensions or Salaries for Military, Naval, or Civil Services.**—It is presumed that no pensions for services, or compensation granted to a public officer, would pass under the bankruptcy to the assignees. The question has been much discussed in England. It was decided that the half pay of a military or naval officer, either in the service of the queen or in that of the East India Company, did not pass to the assignees in the event of the bankruptcy of such officer.—*Gibson vs. East India Company*, 5 Bing., N. C., 262; *Morris vs. Manisty*, 7 Q. B., 674. It was also decided, that a compensation granted to a public officer on the reduction of officers in his department was not assignable by him, and, therefore, would not pass to the assignees; but it was laid down as a principle, that a pension granted entirely as a compensation for past services is assignable; but if a continuing duty or service be part of the consideration, then it is not.—*Wells vs. Foster*, 8 Mee. & W., 149. To remedy the difficulties arising from many conflicting decisions, the last English Bankruptcy Act gives the court power to order a portion of the pay, half pay, salary, emolument, or pension of any bankrupt to be paid to the assignees, to be applied in payment of the debts of such bankrupt; and this provision of the English act confirms the view of the author that, upon a proper construction of this act, such pension, salary, or compensation would not pass under the assignment to the assignee.

**Property of the Bankrupt exempted from the Operations of the Act.**—The severe policy of the English Bankrupt Law exacts the transfer of the whole of the property of the bankrupt. A more liberal system is now established here. The Bankrupt Act of the United States of 1841 excepted from its operation, in precisely the same terms as the present act, the furniture of the bankrupt, and such other articles and necessities as the assignee should designate and set apart, not to exceed in value in any case the sum of three hundred dollars. This section fixes the limit at *five hundred dollars*, as the value of the furniture to be set apart for the bankrupt by the assignee, his action being subject to the control of the court.

In addition to the above exception, the bankrupt will be entitled to retain his wearing apparel, and that of his wife and children, and his uniform, arms, and equipments, if he should be at the time

of his bankruptcy, or if he has been a soldier in the militia or in the service of the United States.

He will also be entitled to retain such other property as now is, or hereafter shall be exempted from attachment or seizure, or levy on execution by *the laws of the United States*.

The section then exempts such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court, by the laws of the State in which the bankrupt *has his domicile at the time of the commencement of the proceedings in bankruptcy*, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four; and such exception is to operate upon the assignment or conveyance of the property of the bankrupt to his assignees. In no case is the property excepted to pass to the assignees, nor is the title of the bankrupt to the property to be impaired or affected by any of the provisions of the act.

The following is an analysis of the various exemptions by all the State laws of the United States, prepared with as much accuracy as is attainable.

**Exemptions by State Laws.**—It will be observed that the section provides for exemptions under State laws, so far only as the latter exempt property *in excess* of that exempted by the act. There is, therefore, no use in giving the laws of States in which the aggregate exemptions can not exceed five hundred dollars in value, exclusive of arms and wearing apparel. This is the case in Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia. It should also be understood that no notice has been taken of laws passed since 1864, nor of laws passed in the seceded States since their secession. The homestead exemptions of the Southern States are confined by the old statutes to white citizens, and those of the Eastern and Middle States are limited by peculiar conditions as to registration.

**Alabama.**—Wearing apparel; a long list of furniture; all books and portraits; implements of trade; three cows and calves; one horse or yoke of oxen; twenty hogs; twenty sheep; five hundred pounds of meat; one hundred bushels corn; all meal on hand; one thousand pounds oats; twenty-five bushels sweet potatoes; thirty pounds wool; one hundred pounds cotton; two plows and gear; cloth on hand; all poultry; gun; cart; and homestead of forty acres in the country worth five hundred dollars.—Code, 1852, Amended Laws, 1854, ch. 13.

**Arkansas.**—Wearing apparel, except watches; and mechanic's implements.

Also in favor of man with family: one horse or yoke of oxen; cow and calf; plow, axe, and hoe; plow gear; spinning-wheels, loom, etc.; spun yarn and cloth; twenty-five pounds hemp, flax, cotton, and wool; two beds, etc.; all furniture proved necessary; arms, etc.; provisions; doctor's books, medicines, and horse; homestead of one hundred and sixty acres in country, or one town lot, with all improvements.—Digest Stat., 503.

**Colorado.**—Wearing apparel. Also in favor of head of a family: family pictures and books; beds, etc.; stoves, etc.; cooking utensils; other furniture worth two hundred dollars; provisions and fuel for six months; implements or stock in trade worth two hundred dollars; library and implements of professional man worth three hundred dollars; working animals worth two hundred dollars; cow and calf, ten sheep, and food therefor for six months; cart; plow; harrow; other farming implements worth fifty dollars; pew and family burial-place.—*Laws, 1861, p. 272.*

**Iowa.**—Wearing apparel; rifle; tools of business; library; pictures; team used in business; pew; and one acre of burying-ground.

Also in favor of head of a family, additional: one cow and calf; fifty sheep, and their wool; five hogs, and all pigs under six months old; necessary food for these animals for sixty days; all flax raised by debtor, and manufactures therefrom; one hundred yards home-made cloth; all spinning-wheels and looms, and other domestic instruments of labor; one bed, etc., for every two in the family; necessary provisions and fuel for six months; earnings for ninety days previous; and a homestead.—*Rev. Stat., 1860, p. 605.*

**Kansas.**—Wearing apparel; all household furniture; cattle, tools, etc., worth three hundred dollars; stock in trade worth four hundred dollars; professional library and instruments; pew and burial-place; also homestead of eighty acres, or one town lot worth one thousand dollars.

**Maine.**—Wearing apparel; bed, etc., for every two persons; fifty dollars' worth of furniture; tools of business; Bibles and school-books; statutes of the State; one hundred and fifty dollars' worth of books; all stoves in use; cow; heifer; two swine; ten sheep, and their wool; three thousand pounds hay for cow, two thousand pounds for sheep, and necessary amount for heifer; thirty bushels grain; potatoes; one barrel flour; ten dollars' worth of wood; twelve cords fire-wood; fishing-boat not over two tons; fifty-six dollars' worth farming implements; one pair oxen; or, instead, two horses worth not over one hundred dollars; hay for same through winter; charcoal on hand; five tons anthracite, and fifty bushels bituminous coal.

Also one hundred and sixty acres wild land bought from the State; worth not over one thousand dollars; or homestead worth not over five hundred dollars; and lot in burying-ground.—*Rev. Stat., 1857, p. 501.*

**Massachusetts.**—Wearing apparel; bed, etc., for every two persons; one stove; twenty dollars' worth of fuel; one hundred dollars' worth of other furniture; fifty dollars' worth of books; one cow, six sheep, one hog; two tons hay; implements of business worth one hundred dollars; stock in trade worth one hundred dollars; family provisions worth fifty dollars; hens; fisherman's boat, tackle, and nets worth one hundred dollars; arms and equipments of militiaman; burying-ground.—*Gen. Stat., 1860, p. 688.* And sewing-machine.—*Laws, 1860, ch. 65.*

Also homestead worth eight hundred dollars.—*Gen. Stat., p. 524.*



**Michigan.**—Wearing apparel; spinning-wheels, looms, etc.; library worth one hundred and fifty dollars; stoves; “things” to carry on business worth two hundred and fifty dollars; family pictures; arms, etc., required by law; pew; burial-place; and, in favor of householders, provisions and fuel for family for six months; ten sheep, and their product; two cows; five swine; food for such animals for six months; and furniture worth two hundred and fifty dollars.—2 Compiled Laws, 1857, p. 1211.

Also a homestead of forty acres in the country, or of one lot in a town.—Id., p. 1217.

**Minnesota.**—Wearing apparel, beds, etc., household stores, cooking utensils, and other household furniture not exceeding five hundred dollars in value; provisions and fuel for one year; tools and implements; four hundred dollars’ worth of stock in trade; the library and implements of professional men; three cows, ten swine, one yoke of oxen, and one horse; or, instead of one yoke of oxen and a horse, a span of horses or mules; twenty sheep, with their wool, raw or manufactured; necessary food for the stock; one wagon, cart, or dray; one sleigh, two plows, one dray, and other farming implements not exceeding three hundred dollars in value.

Also a homestead of eighty acres in the country, or one lot in a town.—Pub. Stat., 1858, p. 569, 570.

**Mississippi.**—Wearing apparel; mechanic’s tools; farmer’s implements for two laborers; laborer’s implements; student’s books for education; library of lawyer, doctor, or clergyman worth two hundred and fifty dollars; instruments of surgeon or dentist worth two hundred and fifty dollars; globes, books, and maps used by teachers; arms, etc., of militiaman; horse; four cows and calves; twenty hogs; one yoke oxen; one cart; one hundred and fifty bushels corn; twenty bushels wheat or rice; eight hundred pounds pork or bacon; and furniture worth two hundred and fifty dollars.

Also homestead of one hundred and sixty acres worth not more than fifteen hundred dollars.—Rev. Code, 1857, p. 529.

**Missouri.**—Wearing apparel; instruments of trade belonging to mechanic.

Also, when owned by the head of a family, ten hogs; ten sheep, and their product; two cows and calves; two plows; one set plow gear; axe, hoe, and all farm implements for use of one man; working-animals worth one hundred and fifty dollars; or, in lieu of all these things, other property worth three hundred dollars; spinning-wheel, loom, and cards; spun-yarn, cloth, etc., homemade; twenty-five pounds each of hemp, flax, and wool; four beds, etc.; other furniture worth one hundred dollars; arms, etc., required by law; provisions worth one hundred dollars; family library; grave-stones; and pew. Lawyers, doctors, and ministers may select professional books in place of other property, and doctors may so select medicines.—Gen. Stat., 1865, p. 641.

Also a homestead worth fifteen hundred dollars, and of one hundred and sixty acres if in the country, or thirty square rods if in a town or village, except in St. Louis, where it may be worth three

thousand dollars, but must not exceed eighteen square rods.—Gen. Stat., 1865, p. 450.

**Nebraska.**—Same as in Iowa.—Laws, 1855, p. 101.

**Nevada.**—Same as in California, except that all sewing-machines and all private libraries are exempt.—Laws, 1865, p. 224.

**New Hampshire.**—Wearing apparel; beds, etc.; Bibles and school-books; twenty dollars' worth of furniture; stove, etc.; twenty dollars' worth of provisions and fuel; one cow; two pigs; six sheep, and their wool; twenty dollars' worth of tools; ton and a half of hay; arms, etc.; of militiaman; pew and burial-place; and homestead worth five hundred dollars.—Comp. Stat., 1853, p. 469, 474.

**New Jersey.**—Wearing apparel; furniture and tools worth two hundred dollars; and homestead worth one thousand dollars.—Laws, 1851, 278; Laws, 1857, 222.

**New York.**—Wearing apparel; beds, etc.; cooking utensils; sundry household articles; family Bible, pictures, school-books, and fifty dollars' worth of other books; spinning-wheels, looms, and stoves; sewing-machine, arms, etc.; twenty-five dollars' worth of mechanic's tools, etc.; ten sheep, and their product; one cow; two swine; provisions for family and cattle on hand; fuel for sixty days; pew and burial-place; two hundred and fifty dollars' worth of other furniture, tools, or team, and ninety days' food for such team.—2 R. S., 367; Laws, 1859, ch. 134; Laws, 1847, ch. 85; Laws, 1860, ch. 152. Also a homestead worth one thousand dollars.—Laws, 1850, ch. 260.

**Ohio.**—Only a debtor having a family has the benefit of these exemptions, viz.: wearing apparel; beds, etc.; stove, etc.; fuel for sixty days; food worth forty dollars; one cow, two swine, and six sheep, or furniture worth thirty dollars in lieu thereof, and their food for sixty days; implements of trade; horse or oxen worth fifty dollars; Bibles, hymn and school books; family pictures; furniture worth thirty dollars; articles of natural curiosity or science; and if a doctor, books or instruments worth fifty dollars, or if a drayman, one horse and cart, etc.—2 Rev. Stat., 1860, p. 114.

Also a homestead worth five hundred dollars, or, if he has none, three hundred dollars' worth of furniture in addition to the above.—Id., p. 1145.

Also earnings for three months previous.—Id., p. 1090.

**Oregon.**—Wearing apparel; furniture of householder worth three hundred dollars; family pictures, and one hundred and fifty dollars' worth of books; four hundred dollars' worth of any thing used in business; ten sheep, and their product; two cows; five swine; provisions and fuel for family for six months; food for animals for three months; and earnings for sixty days.—Stat., 1854, p. 103, 110.

**Tennessee.**—In favor of head of a family: a long list of household furniture; school-books; cow and calf; horse or mule, or yoke oxen; one ox-cart; one wagon worth seventy-five dollars; two saddles, etc.; twenty-five barrels corn; ten bushels wheat; five hundred "bundles" oats; five hundred bundles fodder; hay worth twenty dollars; one thousand pounds pork, or six hundred pounds bacon;

poultry worth twenty-five dollars; six cords wood, or one hundred bushels coal; one gun; mechanic's tools worth one hundred dollars.

Also, in favor of a farmer, two plows and hoes, a set of common tools, five sheep, and ten hogs. Also a homestead worth five hundred dollars.—Code of 1858, p. 428, 430.

**Texas.**—Wearing apparel; furniture worth two hundred dollars; implements of husbandry worth fifty dollars; tools, apparatus and books used in trade or profession; five cows; one horse or two oxen; twenty hogs; one year's provisions; ferryman's boat worth five hundred dollars. Also homestead of fifty acres in the country, or one town lot with improvements worth five hundred dollars.—Pascal's Laws, 628.

**Vermont.**—Necessary apparel, bedding, tools, arms, and furniture; one sewing-machine; one cow; one hog, or its meat; ten sheep, and their wool of one year's growth; forage therefor for one winter; ten cords wood; twenty bushels potatoes; ten bushels grain; one barrel flour; three hives of bees; two hundred pounds segars; poultry worth ten dollars; one yoke oxen; family books; professional books of clergyman or lawyer, or books and instruments of doctor worth two hundred dollars; pew, and grave-stones.—Gen. Stat., 1863, p. 363.

Also a homestead worth five hundred dollars.—Gen. Stat., p. 456.

**Wisconsin.**—Wearing apparel; family books; beds, etc., stoves, etc., cooking utensils, and two hundred dollars' worth of other furniture; two cows; ten swine; one horse; another horse, or a yoke of oxen; ten sheep and wool; one year's food for animals exempt; one wagon; one sleigh; one plow; one drag; fifty dollars' worth of other farming utensils; one year's provisions and fuel for family; two hundred dollars' worth of implements, stock, or books used in business; pew; burial-place; insurance on exempt property; earnings for sixty days; and homestead of forty acres farming-land, or quarter of an acre town-land.—Rev. Stat., 786, 799.

**Notice of Appointment of Assignee.**—The section provides that the assignee is immediately to give notice of his appointment, by publication at least once a week for three successive weeks, in such newspapers as shall for that purpose be designated by the court. This subject will be provided for by the general rules and orders.

**Assignment to be recorded.**—The assignee is to cause the assignment to him, *within six months*, to be recorded in every registry of deeds or other office within the United States, where a conveyance of any lands owned by the bankrupt ought by law to be recorded. The record of such assignment, or a duly certified copy thereof, is to be evidence of the fact of such assignment in all courts.

**Evidence of Assignee's Title.**—A copy, duly certified by the clerk of the court under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as assignee, to take, hold, sue for, and recover any of the property of the bankrupt as provided by the act. It would seem, therefore, that for the purpose of proving the title of the assignee in any action or suit brought by him to

recover the property of the bankrupt, or in any proceeding in which he claimed the right to take and hold the property of the bankrupt, the production of a copy of the assignment duly certified by the clerk of the court, under the seal of the court, will be sufficient.

**Actions against Assignees for Acts done in that Character—Notice of Action.**—The section enacts, that no person shall be entitled to maintain an action against an assignee in bankruptcy for any thing "*done by him as such assignee,*" without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have the opportunity of tendering amends should he see fit to do so.

Where a statute directs that notice of action should be given where it is intended to proceed for any thing done by a party in a particular character, a thing is done in such character where the person who does it is acting honestly and *bond fide*, either under the powers which the act gives, or in discharge of the duties which the act imposes, although he may erroneously exceed the powers given by the act, or inadequately discharge the duties; yet, if he act *bond fide*, in order to execute such powers or to discharge such duties, he is to be considered as acting in pursuance of the statute, and is entitled to the protection conferred upon persons while so acting. This is the principle deducible from the cases in the English courts, where statutable limitations and protections are very usual.

After notice of action specifying the cause thereof, which must of course be in writing, and before the action is commenced, the defendant assignee should tender to the plaintiff, or his attorney, a sum of money by way of amends; and it is suggested that the defendant assignee should plead such facts specially, by way of answer to the action. If the jury at the trial should be of opinion that the plaintiff is not entitled to recover more than the amount tendered as amends, the plaintiff at the trial would be nonsuited. This section, however, contains no provisions as to the course to be pursued, if an action be brought without having given such notice, or where the amends tendered are considered by the jury to have been sufficient; but as the words of the section are, "no person shall be entitled to maintain an action," it may be intended that the plaintiff be nonsuited at the trial. The clause in the English Bankrupt Act is much more specific, and provides, "That every action brought against any person for any thing done in pursuance of this act shall be commenced within three months next after the fact committed; and the defendant in any such action may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time limited as aforesaid for bringing the same, the jury shall find for the defendant; and if there be a verdict for the defendant, or if the plaintiff shall be nonsuited, or discontinue his action or suit after appearance thereto, or if, upon de-

murrer, judgment shall be given against the plaintiff, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any such action as shall be taxed by the proper officer in that behalf."

The words of this section "for any thing done by him as such assignee" differ from the words in the sections in the English Bankrupt Acts, which are "for any thing done in pursuance of the acts," which render many of the English authorities inapplicable. The assignee, in the event of an action being brought against him, and to entitle him to the protection of this act, must be prepared to establish as a justification that he acted in the *bond fide* belief that he had the right as such assignee to do the act complained of. The absence of all reasonable ground for such a belief would, of course, be an ingredient for the jury in determining that no such *bond fide* belief existed.—Booth vs. Clive., 20 L. J. C. B., 150; Hall vs. Thornberry, 3 Exchq. Rep., 846. In an action against the assignees for improperly entering the premises of a third person to seize the bankrupt's goods, it is questionable whether the assignee would be entitled to the protection afforded by this section, Edge vs. Parker, 8 B. & C., 697, or for seizing the goods of a third party upon the premises of the bankrupt, Carruthers vs. Payne, 5 B. & C., 270; and the question is often one of considerable difficulty, each case depending upon its own particular circumstances. If the assignee act upon his own authority, and not by virtue and in pursuance of the statute, or under the direction of the court, he will be responsible as any other individual. To be protected for an "act done as assignee," the act complained of must be consistent with his character as trustee, and which he can justify by virtue of his appointment.

**No Lien on the Books of Account of the Bankrupt as against his Assignees.**—No person shall be entitled, as against the assignee, to withhold from his possession any books of account of the bankrupt, or claim any lien thereon. The mode of obtaining possession of such books by the assignee will be by an application to the court against the party withholding them, summoning him before the court, and obtaining an order for their delivery.

**The Bankrupt, to execute any Instrument, to vest in the Assignee the Assets of Bankruptcy.**—The bankrupt is compellable, at the request of the assignee, and at the expense of the estate, to make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets. Should the bankrupt refuse, after request by the assignee, to execute such instruments, application should be made by the assignee to the court for an order requiring him to execute the necessary documents when tendered to him for such purpose; his disobedience to such order will be a contempt, and punishable. The order will be made, of course, unless the bankrupt dispute the validity of the adjudication. Vide 1 Mont. D. & D., 11 S., 667; 2 Deac., 479.

[illegible]



## THE DUTIES OF THE ASSIGNEES.

SECTION 15. *And be it further enacted*, That the assignee shall demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this act; and he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale, as will, in its opinion, prove to the interest of the creditors; and the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

**Assignee to receive the Estate and Property of the Bankrupt.**—It is the duty of the assignee, immediately upon the assignment being made, to demand and receive from the messenger, and all other persons, the property and estate of the bankrupt.

**Assignee to Sell.**—The assignee is to sell all such unencumbered estate, real and personal, which comes into his hands, on such terms as he thinks most for the interest of the creditors.

**The Court may make Orders concerning the Time, Place, and Manner of Sale.**—Any person interested may petition the court upon this subject, and the court will exercise strict control over this branch of the assignee's duties. The usual mode of sale should be by public auction, and for cash, unless under special circumstances the court may otherwise direct. The general rules and orders will probably prescribe what notice of sale is to be given. The assignee being a trustee for the benefit of all the creditors, will not be permitted, directly or indirectly, to purchase the bankrupt's property. If he does, the sale may be set aside on the application of any creditor. Under peculiar circumstances the court, with the sanction of the creditors, will allow the assignee to bid at the sale and to purchase; but leave from the court must be obtained by him before this can be legally done.—8 Ves., 351, 1 Glyn & J., 112; *Ex parte Bage*, 4 Madd., 459. On the application of the creditors the court will enforce the immediate sale of the bankrupt's property, and if the assignees have been guilty of any delay or willful default, they can be ordered to pay all costs and expenses.—*Ex parte Montgomery*, Glyn & J., 338, 17 Ves., 514.

A purchaser at a sale made by an assignee of the bankrupt's ef-



fects, acquires only such title as the bankrupt had at the time of his discharge; where, therefore, a bankrupt, before the filing of his petition, had assigned the claim due him which was then in the hands of an attorney for collection, and the debtor was duly notified of the transfer, and the claim was, notwithstanding, included in the bankrupt's schedule and sold by his assignee, and afterward paid by the debtor to the purchaser at the assignee's sale, it was held, that the payment by the debtor to such purchaser was no discharge of the debt.—*Anderson vs. Miller*, 7 S. & M., 586. Where debts belonging to the estate of a bankrupt were sold by the assignee, in an action by an assignee of the purchaser to recover the debts, it was held to be sufficient evidence of authority of the assignee in bankruptcy to sell, that he acted as such without record evidence thereof, *Arnold vs. Leonard*, 12 S. & M., 258; and a bankrupt who has obtained his discharge under the bankruptcy may become the purchaser of effects or debts belonging to his estate at such sale, and may afterward maintain suits for the recovery of the debts.

The assignees must give a marketable title to the purchaser of the bankrupt's property sold by them, and not merely the title of the bankrupt. Should any defect exist in such title, care should be taken to point it out in the advertisement or conditions of sale, otherwise the assignees may become personally responsible.

The purchaser of a bankrupt's land, at an authorized sale of it by an assignee, takes the land freed from any encumbrance thereon made by the bankrupt in fraud of creditors.—*Dwinel vs. Perdey*, 32 Maine, 151, 2 Red., 197.

A sale of the bankrupt's property by an assignee, made in conformity with the rule of court under the United States Bankrupt Act of 1841, was held valid; and if the deed contains the requisite recitals, and there is a certified copy of a decree in bankruptcy regular on its face, the deed would be sustained.—*Holbrook vs. Coney*, 35 Ill., 548.

The assignees in bankruptcy have no power to sell or convey the bankrupt's property without an order of the court; and as to the title necessary under the statutory proceedings of bankruptcy, vide *Cleveland vs. Boerum*, 27 Barb., N. Y., 252.

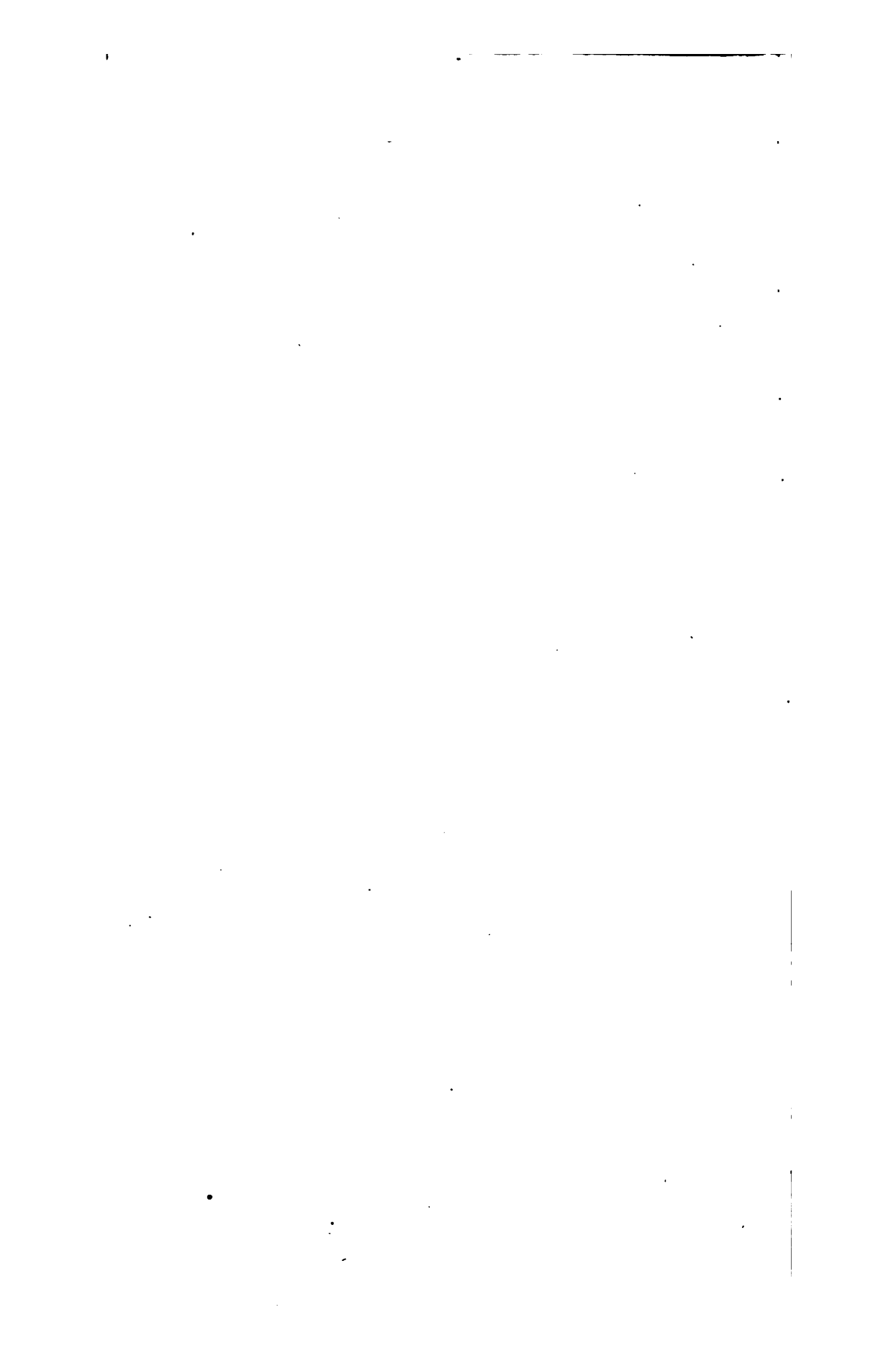
The deed of an assignee conveying the lands of the bankrupt must recite the decree of bankruptcy and the order of appointing the assignee. The right of the assignee to convey depended upon the Act of Congress, and he must convey in the manner prescribed by the act, or the conveyance will be void.—*Gray vs. Heslep*, 33 Mis., 238. So held under the act of 1841.

**Assignees to keep Accounts.**—The assignees are to keep regular accounts of all moneys received by them in such character, and to which accounts every creditor is to have access. A discretion will, however, be exercised by the court in granting the application to inspect the accounts as to the reasonableness of the application.—*Ex parte Runel, re Brewer*, 1 De Gex, M. & G., 491.

in the State that will be a benefit to  
 the State, the Court, the people, the  
 the people, the State, the people, the  
 real or personal, at public auction, in  
 such parts or parcels and at such  
 times and places as shall be determined  
 by the Court, for the purpose of the present  
 Court with the least expense. All  
 notices of public sale made by  
 the Court, or by any officer of the  
 Court, shall be published once a  
 week for three consecutive weeks  
 in the newspaper or newspapers for the  
 jurisdiction by the Judge presiding  
 in this district, at the best  
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 shall have power to order  
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## THE RIGHTS OF THE ASSIGNEES.

SECTION 16. *And be it further enacted,* That the assignee shall have the like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If, at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving, or remaining, or new assignee, as the case may be, he shall be admitted to prosecute the suit, in like manner and with like effect as if it had been originally commenced by him. In suits prosecuted by the assignee, a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

**Actions by the Assignees.**—The assignees may sue for and recover the estate of the bankrupt, all debts due to him and effects, and may prosecute and defend all suits at law or in equity pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been prosecuted or defended by such bankrupt. The assignees may thus commence in their own names any actions at law or suits in equity after the assignment, and may prosecute and defend all actions at law and suits in equity which have been commenced or defended by the bankrupt, and which are pending at the date of the adjudication. Where such actions or suits are pending at the time of the adjudication, the assignees, when appointed, may elect to abandon such actions or suits, or proceed with the prosecution or defense at their discretion; if they elect to proceed or defend, they become liable as any other plaintiff or defendant to the costs of such action or suit. An action can be maintained by the assignees against any person who has received money

which ought to be paid to the assignees. For instance, where goods of the bankrupt have been taken in execution subsequently to the adjudication, and the creditor has received from the sheriff the proceeds of the sale of such goods, the assignees can recover the money thus received; or, if the sheriff has seized the goods subsequent to the adjudication, and before sale, an action of trover, after demand and refusal, can be maintained to recover their value against him.—*Hetchen vs. Campbell*, 3 Wilson, 304, S. C., 2 Black Rep., 827. So against a person who, after notice of adjudication of bankruptcy, and during the time the bankrupt was imprisoned, sold the goods of the bankrupt, and paid over the proceeds to him.—*King vs. Leith*, 2 Term Rep., 141.

A creditor in England who, knowing of the adjudication of bankruptcy, attached property of the bankrupt in a foreign country, was held liable to refund the proceeds, if received, or to pay the value of the goods, if detained, in an action by the assignees, *Phillips vs. Hunter*, 2 H. Black., 402, or, upon the same principle, if money of the bankrupt be attached.—*Still vs. Warwick*, 1 H. Black., 665. So where a payment has been made by a bankrupt to a creditor, or goods or property delivered in contemplation of bankruptcy, under such circumstances as to amount to a fraudulent preference, the assignees can recover such money or the value of such goods. Or if property has been conveyed by the bankrupt in fraud of his creditors, the assignees can recover such property, or the value of it if it has been converted. If bankers pay the draft of a trader keeping cash with them, after notice of adjudication of bankruptcy, the assignees may recover the amount.—*Vernon vs. Hankey*, 2 Term Rep., 113. Assignees, as such, may maintain an action for money lent by the bankrupt before his bankruptcy.—*Richardson vs. Griffin*, 5 M. & S., 325. The assignees may sue for breach of covenants entered into with the bankrupt, and are entitled to the benefit of the same estoppels as the bankrupt would have been.—*Parker vs. Manning*, 7 T. Rep., 537. Assignees may support an action of trover against an agent or servant of the bankrupt who, after the adjudication of bankruptcy, receives goods on account of his principal and master, although such agent or servant has accounted with his principal or master for the proceeds.—*Coles vs. Davies*, 1 Lord Raymond, 724. The assignees may in general elect to sue in assumpsit or in trover; hence they may either affirm or disaffirm the act of a party who, after adjudication in bankruptcy, has converted the bankrupt's effects into money, either by bringing an action for money had and received to their use, which affirms the contract, or by bringing trover, which disaffirms it, *King vs. Leith*, 2 Term Rep., 141; but they can not affirm the same transaction in part, and disaffirm it for the remainder.—*Wilson vs. Poulter*, 2 Strange, 859. The assignees may maintain an action to recover money lost by the bankrupt by gaming, or recover from the stakeholder any money which shall have been deposited by the bankrupt upon any wager, bet, or stake, in pursuance of the provisions of the Revised Statutes, chap. 29, article 3, vol. i., page 614, Edmunds's edition.—*Brandon vs. Pate*, 2 H.

Black., 308. The assignees may support an action of ejectment after the title is completely vested in them.—*Doe vs. Mitchell*, 2 M. & S., 446. The debtor to a bankrupt may plead the Statute of Limitations in an action brought by the assignees, in the same manner as he could to the claim of the bankrupt himself.—*Grey vs. Bendez*, 1 Strange, 556.

Assignees could not maintain an action on a demand arising from a tort, such demand did not pass by the assignment, as a demand for deceiving the bankrupt in the sale of goods.—*Shoemaker vs. Keely*, 2 Dall., 213. The bankrupt's right of action against a sheriff for not collecting an execution passes to the assignees.—*Sullivan vs. Bridge*, 1 Mass., 511. In an action by assignees for the bankrupt's services as supercargo of a ship, it was held, that the defendant could not set off a demand against the bankrupt for not keeping the ship fully insured.—*Brown vs. Cuming*, 2 Cairns, 33.

The Bankrupt Act by the decree of bankruptcy divests the bankrupt of all property and rights of property, except as therein provided, and declares that all suits pending to which he is a party shall be prosecuted or defended by the assignee to their final conclusion, in the same way, and with the same effect, as they might have been by the bankrupt himself; consequently the assignee must be made a party to the litigation which may be pending in favor of or against the bankrupt, or it can not progress to a trial.—*Lacy vs. Rockett*, 11 Ala., 1002.

The assignee of a bankrupt copartner is a necessary party to a suit in equity to recover a debt due to the firm at the time of the bankruptcy, where the assignee has a beneficial interest in the partnership effects as trustee for the separate creditors of the bankrupt. But where the bankrupt has obtained his discharge in bankruptcy, and the copartnership is insolvent, so that the assignee in bankruptcy has no interest in the effects of the firm, and where these facts are distinctly stated in the bill, the assignee need not be made a party.—*Coe vs. Whitbeck*, 11 Paige, 42.

**Compelling the Assignee to be a Party.**—The assignee in bankruptcy may be made a party by motion to a suit in which the bankrupt was a party when he was declared such. Where the assignee in a proper case fails to come in as a plaintiff, the defendant may suggest the plaintiff's bankruptcy, and upon the production of the decree in bankruptcy the court may order the assignee to make himself a party within a limited time, and in default thereof the suit to abate for want of prosecution; but, however this may be, if the fact of the plaintiff's bankruptcy is not disputed, it is competent for the defendant to plead in bar to an action by the bankrupt himself, the decree declaring the plaintiff to be a bankrupt.—*Lacy vs. Rockett*, 11 Ala., 1002.

Where property is fraudulently conveyed by a bankrupt, his assignee can sue in trover or maintain an action for it, which the bankrupt could not have maintained against a fraudulent grantee.—*Carr vs. Gale*, 3 M. & W., 38.

Under the Bankrupt Act of 1841 a District Court had jurisdic-



tion of an action by an assignee in bankruptcy to recover a balance due from a principal to the bankrupt, as factor, at the time of the presentation of his petition. Such a suit is essential to the winding up of the proceedings in bankruptcy, and jurisdiction in it depends upon the subject matter, and not upon the parties.—*Kelly vs. Smith*, 1 Blatch., Ct. Ct., 290.

It was held under the Bankrupt Law of 1841 that an assignee may maintain an action in his own name in a State court for the breach of a contract made with the bankrupt.—*Ward vs. Jenkins*, 10 Met., 583.

**Form and Nature of the Action.**—In Pennsylvania, an involuntary transfer of property by a proceeding in bankruptcy in a foreign State will be regarded, except so far as it interferes with the claims of American creditors, and foreign assignees may sue for debts in the name of the bankrupt.—*Merrick's estate*, 5 Watts & Serg., 9. In Virginia it has been held, that the assignees of a bankrupt in England can not maintain an action at law in that State in their own names, but must bring the action in the name of the bankrupt.—*Blane vs. Drummond*, 1 Brock., 82. Vide also 2 Ashmead, 485.

The assignees, and not individual creditors, are the proper parties to sue for property fraudulently conveyed by a bankrupt.—*Edwards vs. Coleman*, 2 Bibb., 204.

Where a bond was given to partners, and one of them became a bankrupt, it was held, that a suit upon the bond was properly brought in the name of the solvent parties and the assignee of the bankrupt.—*Peel vs. Ringgold*, 1 Eng. Eq., 546.

Where a declaration stated that "A, assignee of the estate and effects of B, a bankrupt, complains, etc.," it was held that there was no occasion for referring to the Bankrupt Act, as it was a public law.—*Hastings vs. Fowler*, 2 Carter, Ind., 216.

An assignee in bankruptcy may commence a suit against a citizen of the same State in the courts of the United States, though such citizen should not be a party to the proceedings in bankruptcy.—*Atkinson vs. Purdy*, Crabbe, 551.

If the aid of a State court is sought by an assignee in bankruptcy to recover property, he must submit to the terms prescribed by such court.—*Pindel vs. Vimont*, 14 B. Mon., Ky., 400. Where the bankrupt himself could have recovered, and the assignees derive their title through him, it is suggested by the author that, by analogy to the English law, the assignees in such action must declare as assignees of the bankrupt; but where the right of action accrues to the assignees *after* the adjudication of bankruptcy, and where the bankrupt himself could not have recovered, the assignees may bring the action in their own names. When one of several partners becomes bankrupt, the action should be in the name of the solvent partner and the assignees of the bankrupt.—*Thomason vs. Freer*, 10 East., 418. For if it be brought in the name of all the partners, including the bankrupt, the bankruptcy may be pleaded in bar.—*Smith vs. Sloper*, 1 East., 363; *Teed vs. Elworthy*, 14 East., 211. The usual form of action brought by the assignees in cases of an amotion of property

belonging to the bankrupt is that of *trover*; but, in order to maintain such action, the bankrupt must have had a right of possession in the chattel at the time of the adjudication of bankruptcy. An action of trespass can not be maintained at the suit of the assignees for any injury or removal of property before they have obtained actual possession of it; and in the English courts it has been much doubted whether the assignees of a bankrupt can sue in case for a tort committed against the estate of the bankrupt. The safer course is to adopt the form of *trover* or *replevin*, and, in all cases where there has been no actual conversion of the goods, to make a demand and receive a refusal before commencing the action.

Unless the delivery, or detention, or removal of goods or property has occurred after the adjudication of bankruptcy, and if the transaction be one which the bankrupt himself, if solvent, could not have impeached or invalidated, the assignees can not recover the property. The assignees must all join in an action on contract, and the omission of one of them is ground of nonsuit.

**Actions and Suits in which the Assignees are Parties, not to abate by Death or Removal from Office.**—This section enacts, that no suit in which the assignee is a party, either as plaintiff or defendant, shall be abated by his death or removal from office; but the same may be prosecuted and defended by his successor, or by the surviving or remaining assignee, as the case may be. Upon motion of the surviving, or remaining, or new assignee, he is to be admitted to prosecute the suit in like manner, and with like effect, as if it had been originally commenced by him.

**Evidence of Assignee's Authority to sue.**—In suits prosecuted by the assignee, a certified copy of the assignment made to him by the judge or register is made conclusive evidence of his authority to sue.

**SECTION 17.** *And be it further enacted,* That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of

the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon. He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court. He shall be allowed, and may retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court. He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy, and may, under such direction, compound and settle any such controversy by agreement with the other party, as he thinks proper and most for the interest of the creditors.

X SECTION 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient. At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or, at its discretion, by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all

known creditors, and by such person as the court shall direct. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate. No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility. An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

The assignee after the receipt of any money belonging to the estate is, as soon as may be, to deposit the same in some bank in his name *as assignee*, and to keep it distinct and apart from all other money in his possession. The goods and effects belonging to the estate are also to be kept by him separate and apart from all other goods in his possession. He is also to designate by appropriate marks the property of the bankrupt, so that it may be easily and

clearly distinguished from his own property, and may not be exposed or liable to be taken as his property, or for the payment of his debts.

**The Court may direct the temporary Investment of Money.**—If there is a probability that the distribution of the estate may be delayed by litigation or other causes, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or the register; or it may authorize such money to be deposited in any convenient bank, at a rate of interest to be agreed upon between the assignee and such bank. The assignee will be entitled to retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty as such assignee, and a reasonable compensation for his services. The amount of compensation to be allowed him is in the discretion of the court.

**Assignee may submit Disputes to Arbitration.**—Under the direction of the court the assignee may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators to be chosen by him and the other party to the controversy. In submitting any questions to arbitration, the assignees should be careful, in the agreement of reference, or by the terms of submission, expressly to protect themselves from any liability beyond the assets of the bankrupt's estate, or they will be personally liable to the extent of the award. — 2 Rose, 50. The assignees are not bound by the terms of submission to a reference by the bankrupt.—*Marsh vs. Ward*, 9 B. & C., 659. If any reference be pending between the bankrupt and another party at the time of their appointment as assignees, they should be made parties to such reference.

**Assignees may compound and settle Disputes.**—By direction of the court the assignee may compound and settle any controversy by agreement with the other party in the manner which he thinks proper, and most for the interest of the creditors. If the assignees should adopt any of the courses allowed by this section without having obtained the permission or direction of the court, they incur the risk of not having their costs and expenses allowed out of the estate.—6 Bing., N. O., 174; 8 Scott, 280.

**Removal of Assignees by the Court.**—The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient.

Objections by any creditors to the assignees chosen should be made within a reasonable time; and creditors authorizing the assignees to act, having knowledge of any objection to their fitness or eligibility, will be estopped from making the objection afterward.—*Ex parte Nash*, 1 Mont., 501.

Poverty alone of an assignee is no sufficient ground for removal; but subsequent insolvency or bankruptcy is.—*Ex parte Copeland*, 1 Mont. & Ayr., 306; *ex parte Bowsar*, 1 Mont. D. & D., 194. Should the assignee have received a fraudulent preference, he would be removed. The bankrupt may petition on sufficient grounds for the re-

removal of the assignee.—*Ex parte* Oakes, 2 Mont. D. & D., 60. Where an assignee has accepted the office, he can only retire upon payment of costs; but where he is removed by the court for the benefit of the estate without any fault or dereliction of his own, he is entitled to his costs, and all the expenses he may necessarily have incurred.—*Ex parte* Watts, 1 Deac. & Chitt., 322; *ex parte* James, 1 Deac. & Chitt., 272. It has been held, in the construction of the English Bankrupt Act, that the removal of assignees is a matter within the discretion of the judge in bankruptcy with which the Court of Appeal will not interfere, unless it is clearly established that such discretion has been wrongly exercised.—*Ex parte* Bates, 21 Law J. Bank, 20; 16 Jurist, 459.

**Creditors may remove Assignee.**—At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, such creditors may, with *consent of the court*, remove any assignee by such a vote as is provided by Section 13 for the choice of the assignees.

**Assignee may resign his Trust.**—The assignee may, with the consent of the judge, resign his trust, and be discharged therefrom. Vacancies caused by death, or otherwise, may be filled by appointment of the court, or by re-election by the creditors in manner hereinbefore provided.

**Assignees subject to the Order of the Court.**—The court may make all orders to secure the proper fulfillment of the duties of the former, as well as the present assignees, and may compel the execution of any instrument, and punish any disobedience by an assignee of any lawful order or decree of the court as for a contempt of court.

**Compensation to the Assignee.**—The assignee, under the direction of the court, may retain out of moneys in his hands all the expenses he has necessarily incurred in the discharge of his duty, and a reasonable compensation for his services. As there is no provision in the act, as in the English Bankrupt Acts, for the employment of counsel and attorneys to prosecute the proceedings in bankruptcy, and no system provided for the taxation of their costs and professional charges, it is presumed that when employed by the assignees in compulsory bankruptcy, or in cases of opposition, etc., in voluntary bankruptcy, the assignees will be justified in paying such charges as necessary disbursements, subject to the approval of the court.

## PROOF OF DEBTS AND CLAIMS.

SECTION 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but

not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the

name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules. Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate.

SECTION 20. *And be it further enacted,* That in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set-off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *provided,* that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property ex-



ceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess, or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

In order that the main object of the Bankrupt Laws, viz., the equal distribution of the debtor's property among his creditors may be accomplished, it is obviously necessary that strict regulations should be established, designating the manner in which creditors may, by proving their debts, entitle themselves to share in such distribution, and designating also those claims which are to be considered *debts*, so as to entitle the persons proving them to share in the division of the assets. It must be remembered that whether a debt is provable under the bankruptcy, or is barred by the bankrupt's discharge, are convertible terms; and while the attempt has been made accurately to classify the debts which are provable in the notes to this section, a reference to the notes under the title of the "Bankrupt's Order of Discharge" will assist the reader in ascertaining the nature and character of those debts which are provable under the bankrupt's estate.

**Provable and Non-provable Claims.**—A Court of Bankruptcy being a Court of Equity, as well as of law, is not compelled to receive all legal debts; but has the right to inquire into the consideration of every debt tendered for proof, even if it be a judgment.—*Ex parte Mudie*, 3 Mont. D. & D., 62. The principle is, that the debt must have been contracted *bond fide*, and for good and valuable consideration, and, if payable at the time, such as the creditor might have had his remedy for against the bankrupt, either at law or in equity. It must, in general, have been a debt either actually ascertained, or capable of being ascertained without the intervention of a jury, unless it be a contingent debt or contingent liability, for which express provision is made hereafter. Vide those Titles. The debt must be due at the time of the adjudication, though payable at a future day. Before enumerating generally those debts which are provable, it must be observed that no debt is provable if it arise out of an illegal contract, or is barred by any statute of limitations in force in the State or place where the debt was contracted.—*Ex parte Dewdney*, 15 Ves., 248; *ex parte Hoffer*, 2 Rose, 245. As to want of consideration, an exemption has been made as to a voluntary bond given by the bankrupt, which, after a surplus, was admitted to proof.—*Gardner's assignees vs.*

Skinner, 2 Sch. & Lef., 228; *ex parte* Hoskins, 2 De Gex & S., 549; Meggison vs. Foster, 2 Yonge & C., 336.

Within the compass of these notes it is impossible to arrange alphabetically every provable claim. From those given it is hoped that the principles upon which proofs of debts under bankruptcy are admitted may be deduced.

**Agents.**—On the bankruptcy of an agent or broker who has been intrusted by the owner of goods which he has pledged before the adjudication of bankruptcy, the English Bankrupt Act gives the owner the right to redeem and to prove under the bankruptcy for the amount paid to redeem them, or for the value of the goods if not redeemed.

If an agent, or any other person becoming bankrupt, is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the damages may be assessed by order of the court in such manner as it may deem best, and the amount so assessed is to be proved under the estate. This provision should be carefully borne in mind. It embraces not only actions founded upon contract, but those for torts, as trover, trespass for taking goods, replevin, and detainue; and as power is given to prove under the bankruptcy in respect of such claims after the damages have been assessed, the order of discharge, when obtained, will extinguish them.

**Agreement—Breaches of, may be Proved.**—If the damages are ascertained or liquidated, or when not ascertained or liquidated, the court may cause such damages to be assessed, and the sum so assessed is provable.

**Annuity.**—The English Bankrupt Acts contain express provisions for proofs by creditors to whom the bankrupt may have granted annuities, such annuities to be valued, and the amount so valued to be proved. There is no provision of this nature in this act, and a question may arise whether such a debt would be provable. Under the provision that where the bankrupt is liable to pay rent, or *other debt falling due at stated periods*, an annuity might be included, the creditor might prove for a proportionate part up to the time of the bankruptcy; but the installments and arrears falling due subsequent to the bankruptcy would not be provable. Vide the notes upon this subject, title "Bankrupt's Order of Discharge."

**Award.**—An award made under an order of reference, gave a decree for a sum to be paid by the defendant. After the date of the award, and before judgment was signed, the defendant committed an act of bankruptcy and gave notice thereof to the creditor, who afterward entered up judgment, and the debtor was subsequently adjudicated a bankrupt. Held, that the creditor was entitled to prove for the debt awarded, interest and costs, as a liquidated sum, until it could be shown that the award could be set aside at law.—*Ex parte* Harding, 28 Eng. Law and Eq., 267.

Money due under an award may be proved.—*Ex parte* Lowndes, 1 Mont. Bank L., 17.

**Bail.**—If the bankrupt be bail, and his liability shall not have

become absolute until after the adjudication, the creditor may prove the same after such liability has become fixed, and before the final dividend shall have been declared. Where a person has become bail for the bankrupt, he may prove for the amount, or any part thereof, which he has actually paid in discharge of his liability, although such payments may have been made after the commencement of the proceedings in bankruptcy. This provision is adopted from the late English Bankruptcy Acts, where, as the law formerly stood, the bail, who had paid the amount of the recognizance *after the bankruptcy* of the principal, were not admitted to prove. If the creditor has proved, the bail who has paid the debt is to stand in the place of such creditor, and receive the dividend. The creditor is his trustee to that extent.

**Bills of Exchange and Promissory Notes.**—Bills and notes, though *not due* at the time of the adjudication of bankruptcy, are debts provable. A bill drawn before the bankruptcy, though not protested until after the bankruptcy, is provable.—*Macartney vs. Barrow*, 7 East., 437 u. S. C., 2 Strange, 49. When two merchants exchange acceptances, and afterward become bankrupts, each, or the assignees of each, may prove the other's acceptances under the bankruptcy, though the acceptances of neither were due at the time of the adjudication, *Rolfé vs. Caslon*, 2 H. Black., 570; especially where each has engaged to pay his own acceptances.—*Buckler vs. Bullevant*, 3 East., 72.

Where an indorser was compelled to pay money for a bankrupt, after the bankruptcy, upon an indorsement prior to the bankruptcy, he was allowed to prove his debt.—*Tunno vs. Bethune*, 2 Dessau, 285. The holder of more than one bill or note of the bankrupt, if such bills or notes represent *distinct and separate debts*, is not compelled to prove under the bankruptcy upon all; he may prove upon one, and proceed at law upon the others.—*Ex parte Newton*, 2 Mont. D. & D., 51. The proof in bankruptcy is made in respect of the consideration for the bill or note, and the latter are treated as securities only.

Whatever would be a defense at law or in equity to a bill or note, such as usury, want of consideration, or illegal consideration, in the hands of the party attempting to prove, is available as an answer to such proof.—*Long vs. Bland*, Bunbury, 170.

If the bill or note has not been indorsed by the bankrupt, the holder can not prove it under the bankruptcy, *ex parte Husler*, 3 Madd., 117; but if given for a debt, then the original consideration is provable.—*Buck's Bank Cases*, 113. Where the holder of a bill or note by any act or omission has released the bankrupt—as where due notice of dishonor has not been given, or where time has been given to the principal maker of a note or acceptor of a bill of exchange without the consent of the bankrupt, if the drawer or indorser (and not being a mere accommodation transaction as between the bankrupt and the person to whom time was given)—proof can not be made.—*Stevens vs. Lynch*, 12 East., 38; *ex parte Holden*, Cook, 189; *Tindall vs. Brown*, 2 Term Rep., 186. So if barred by the Statute

of Limitations. If the bill of exchange is *bond fide* in the hands of the holder at the time of the adjudication, whether he has actually paid the amount to take it up before adjudication, is immaterial, he may prove when he has done so. The holder of a bill of exchange or promissory note may prove under the estate of as many drawers, acceptors, or indorsers as are bankrupts, and may bring actions against other parties on the security, and may receive a dividend upon his whole debt from each of the estates under which he has proved, *ex parte* Dyer, 6 Vesey, 9; *ex parte* Adam, 2 Rose, 36; *ex parte* Bank of Scotland, 2 Rose, 197; *ex parte* Wildman, 1 Atk., 109; but he can not receive more than the amount of such bill or note. A creditor has the right to avail himself of all collateral securities to the extent of his just demand. This principle does not apply to partners who are bankrupts. A creditor holding the joint bill or note of a firm must elect whether he will prove under the joint or separate estate, *ex parte* Bonbonus, 8 Vesey, 542; 2 Vesey & Beames, 254; and so, although he holds distinct securities of each partner unless there be a surplus.—1 Rose, 21. Where a bill has been given in lieu of a former bill unpaid, the latter may be treated as a nullity, and proof made upon the former bill.—*Ex parte* Barclay, 7 Vesey, 507. Where the holder has been paid a portion of a bill by the person who indorsed it to him, he may prove for the whole amount under the estate of a bankrupt acceptor or drawer, and becomes a trustee for such indorser.—*Ex parte* De Tastet, 1 Rose, 10; *ex parte* Turner, 3 Vesey, 243. Where a bill or note is transferred by way of sale, and is not indorsed by the bankrupt transferrer, it is not provable, *ex parte* Smith, Cook, 120, 1 Montagu, 142; but if such bill unindorsed be deposited for a debt due, such debt is provable.—*Ex parte* Cook, 120. Where the holder of a bill has proved the amount under the bankruptcy, and is afterward paid such amount by another party to the bill, an application should be made to expunge such proof, and disallow a dividend, or, if any dividend has been received, the court will order it to be refunded. The acceptor of a bill, or the maker of a promissory note, contracts a debt by the accepting or making the instrument, and an indorser who has been compelled to take it up after the bankruptcy, may prove for the amount.—*Cowley vs. Dunlop*, 7 Term Rep., 565; *Joseph vs. Orme*, 2 New Rep., 180.

The holder of a note made before, but transferred after the bankruptcy of the maker, may prove it, and receive the dividend.—*Humphries vs. Blight*, 4 Dall., 370. But the holder must have allowed all offsets which could have been made against the assignor, though the note was made payable "without defalcation."—1 Wash., C. C., 44. The indorser of a bill of exchange protested before the drawer's bankruptcy, and paid afterward, may set it off against a demand of the assignee, though he could not prove it under the bankruptcy. But he must show that the debt was due to him alone when the assignee's action was brought.—*Marks vs. Barker*, 1 Wash., C. C., 178.

The holder of a bill of exchange is entitled to prove his debt in

bankruptcy against the drawer, the acceptor, and the payee, and to receive a dividend from all their estates until his full debt is paid. And if one only be bankrupt, he may prove his debt against such bankrupt, and also proceed against the others at law.—*In re Babcock*, 3 Story, 393.

**Bills or Notes on which the Bankrupt is Surety only.**—Where the liability of the bankrupt has not become absolute until after the adjudication of bankruptcy, proof may be made after such liability has become fixed, and before the final dividend shall be declared. This provision remedies the state of the English law under which a surety or accommodation acceptor, drawer, or indorser could not have proved when he had paid the liability after the adjudication.—*Smith vs. Gale*, 7 Term. Rep., 364. A debt due by a surety, but payable after the date of the adjudication, is provable.—*Brooks vs. Lloyd*, 1 Term. Rep., 17. The proof in these cases must be made before the final dividend is declared. In all those cases in which the liability of the bankrupt as surety is well defined, and it appears probable that it must result in a debt from the default of the principal debtor, the court will allow the creditor, upon establishing the facts before payment, to enter a claim upon the proceedings. It would have an equitable jurisdiction to allow such claim, as well as by this act.—*Ex parte Beaumont*, 1 Fonb., B. C., 268. A debt of this character being provable, the bankrupt's discharge will be a bar to any action, and every facility for the creditor receiving his proportion of the assets of the estate should be afforded.

**Bonds.**—Voluntary bonds are provable, on condition that they are not paid until all the other debts due by the bankrupt are satisfied.—*Garland vs. Skinner*, 2 S. & L., 228. The consideration of a bond under seal can be investigated upon proof offered, and if illegal, is not provable.—*Simpson vs. Bloss*, 2 Marsh, 542; *Jones vs. Randall*, Cowp., 39. A bond of indemnity is provable under the section after liability fixed. The court will rectify a palpable mistake in the condition of a bond, to enable the proof to be made.—*12 Mont. & Ayrton*, 541. Where there are several obligors, the obligee may prove the whole amount due to him under the estate of each of the bankrupts, until he receives the full amount of his debt.—*1 Atk.*, 109. The interest provable, when secured by the bond, must not, when added to the principal sum, exceed the penalty.—*Cook*, B. L., 207. Where the liability of the bankrupt obligee has not become fixed until after the bankrupt's discharge, as on a bond for the performance of covenants in a lease, or otherwise, his discharge is no bar to an action on such bond. It was decided under the Bankrupt Act of the United States of 1841, that a bond taken as absolute security for actual advances and responsibilities, was a legal debt provable under the bankruptcy, and the bankrupt may therefore set up his discharge in bar to any demand which such security was intended to cover. So a judgment given by a debtor in trust for a creditor as security for existing advances. But where a bond or judgment is given merely for indemnity, or where a party is bail or surety, no debt is provable till the bail or surety is actually damnified by payment.

A jail bond for the limits given upon the commitment of a debtor to jail upon execution, is not provable under the bankruptcy of a debtor before there has been a breach. The discharge of the bankrupt obtained after commitment, is therefore no bar to an action upon the bond for a breach committed after the decree of bankruptcy.—*Dyer vs. Cleaveland*, 18 Vt., 3 Washb., 241. But if the bond were provable in such case, the discharge of the bankrupt would not release the sureties. Vide case last cited.

Bonds to secure annuities given by the bankrupt to trustees as a provision for the wife, or to replace stock at a certain time, are provable under the bankruptcy.—*Roosevelt vs. Mark*, 6 Johnson Chan., 266. Claims resulting from the breach of an official bond, subsequently to the debtor's petition in bankruptcy, were held to be provable under the Bankrupt Act of 1841.—*Fowler vs. Kendall*, 44 Maine, 448.

**Costs.**—Costs at law *after judgment* bear relation to the debt; therefore, if the debt may be proved, so may the costs, *Scott vs. Ambrose*, 3 M. & S., 326; whether of action of tort or contract.—*Longford vs. Ellis*, 1 H. Black., 29 N. S. C.; 14 East., 202, n.; S. P. Beeston vs. White, 7 Price, 209. Hence, if a party become bankrupt after final judgment, the costs are in all cases provable.—*Gulliver vs. Drinkwater*, 2 T. Rep., 261. So if, between the period of a nonsuit at nisi prius and a judgment on the same in banco, plaintiff become bankrupt, the costs of the nonsuit are provable under the commission, *Watts vs. Hart*, 1 B. & P., 134; *Contra*, *Walker vs. Barnes*, 1 Marsh., 346, S. C.; 5 Taunt., 778, though the plaintiff become bankrupt before the taxation.—*Hunt vs. Meade*, 5 T. R., 365; *Phillips vs. Brown*, 6 T. R., 282.

So where a bankrupt sued commissioners for false imprisonment, and they obtained judgment for costs, and that bankruptcy was superseded, and another issued on the same act of bankruptcy under which he obtained his certificate, such costs were holden a debt provable under the latter commission.—*Holding vs. Impey*, 1 Bing., 189, S. C.; 7 Moore, 614. And the same rule applies to the costs of a writ of error.—*Graham vs. Benton*, 2 Stra., 1196; S. P. *Phillips vs. Brown*, 6 T. R., 282. And formerly, even where the verdict was obtained after the bankruptcy, the costs were considered provable, *Lewis vs. Piercy*, 1 H. Black., 29; but where a verdict was found for defendant, and the plaintiff afterward became bankrupt, but before judgment, the costs were holden not provable.—*Walker vs. Barnes*, 1 Marsh., 346; 5 Taunt., 778. And the court were of the same opinion where an action was brought against a bankrupt as executor after the bankruptcy, and he incurred costs by a false plea.—*Howard vs. Jemmett*, 3 Burr., 1368; S. C., 1 Black., 400.

**Covenants.**—A covenant to pay money at a fixed time after the bankruptcy is provable.—*Charlton vs. King*, 4 Term Rep., 156. As to proofs upon covenants to indemnify, to build houses, covenants against encumbrances, etc., where *the liability has arisen*, the damages may be assessed, and the claims are then admissible as proofs. As to liabilities *in futuro* upon covenants, vide "Contingent Debts and Contingent Liabilities."

Where a composition deed contained a clause, that, in the event of the bankruptcy of the debtor, the covenants of the creditors should be void, and the first installment of the composition had been paid, the creditors were allowed to retain the amount, and prove for the whole of the residue.—*Ex parte Vere*, 1 Rose, 281; *ex parte Peele*; *id.*, 435. Where, under a composition deed, no funds were appropriated for the dividends or installments, it was held that a creditor, not having received them, could not claim them out of the bankrupt's estate, but must come in *pari passu* with the other creditors.—*Ex parte D'Oliveira*, 8 Ves., 84. But where an assignment was made of certain book debts to those creditors who should execute the deed, with a covenant that, if they were not paid in full within two years by the proceeds of those debts, he, the debtor, would pay the deficiency within one month after the expiration of the two years, and he became bankrupt before the two years elapsed, it was held that the creditors who executed the deed were entitled to the produce of that fund, and might also prove for the deficiency under the estate of the debtor.—*Ex parte Richardson*, 14 Ves., 114. Any fraud practiced by a creditor in procuring the composition deed will vitiate his proof if creditors have been deceived by it.—*Ex parte Oakley*, 1 Rose, 198.

The covenants in a mortgage deed were held, under the Bankrupt Law of 1841, not to be such debts as could be proved or discharged in bankruptcy.—*Bush vs. Cooper*, 26 Miss., 599. The author ventures to suggest that this decision is erroneous. Wherever an action of debt may be maintained against a bankrupt upon a mortgage deed for a sum payable at any time before the bankruptcy, or at the time of the bankruptcy, or wherever a breach of any covenant in a mortgage deed has been committed by the bankrupt before his bankruptcy, the mortgagee *must* prove, and the order of discharge extinguishes such debt or damages on the breach of covenant.

**Common Carrier.**—Under the Bankrupt Act of 1841, a claim against a common carrier, arising from contract, though for unliquidated damages, was provable, and was discharged by the certificate in bankruptcy.—*Campbell vs. Perkins*, 4 Selden, N. Y., 430.

**Contingent Debts and Contingent Liabilities.**—The question of what constitutes a contingent debt or contingent liability is one of much importance to the bankrupt, because the provability of such claims, and his discharge from liability in respect of them, are, as before observed, convertible terms.

In all cases where contracted by the bankrupt, and not otherwise provided for by the act, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends if the contingency shall happen before the order for the final dividend. He may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, and be allowed to prove for the amount so ascertained. This provision allowing the proof of contingent liabilities is of very wide effect. There is a

distinction between a *contingent liability*, which may never in fact become a debt, and a *debt payable upon a contingency*.

Where a contingent debt exists, and the event making the debt payable happens before the final dividend, no difficulty can arise. Proof can easily be made; but the creditor, it is presumed, is not to disturb former dividends which may have already been paid to the creditors. There is an express provision in the English Bankrupt Act to this effect, which is absent from this act. The creditor should, therefore, apply immediately to have such contingent debt ascertained by the court, and to prove for that amount, which will entitle him to all the dividends if the contingency happen before the order for the final dividend. The section makes no distinction between contingent debts and contingent liabilities, and, although obscurely drawn, must mean that the proof is not to be allowed unless the contingency has happened, or the contingent liability has arisen. There is no provision as to how long such a claim is to remain upon the proceedings. There should be some limitation. The English statute allows six months for converting the proof into a claim; and, unless done within that time, such claim is to be expunged, wholly or in part, from the proceedings on the application of the assignees. The question is, What are contingent debts and contingent liabilities, within the meaning of this section which are capable of proof, and from which the discharge of the bankrupt releases him? The debt must be payable upon *some* contingency, and the liability must arise upon *some* contingency. A covenant in a marriage settlement to pay a sum certain to trustees within a certain time after the death of the settlor is a debt payable upon a contingency.—*Ex parte Tindal*, 8 Bing., 402. A debt on a guarantee which did not become absolute before the bankruptcy, is provable as a contingent debt.—*Ex parte Simpson*, 3 Deac. & Chitty, 792; *ex parte Myers*, 2 Deac. & Chitty, 251. By a deed of separation between husband and wife, the former covenanted that he would every year, during the joint lives of himself and wife, pay a certain annuity by equal quarterly installments; but that if they should at any time thereafter cohabit as man and wife, that the annuity should cease. While they continued to live separate the husband became bankrupt. It was held, that such claim was not provable—that it was not an annuity, nor a debt payable upon a contingency, nor a liability to pay money upon a contingency—and, consequently, that the discharge under the bankruptcy was no bar to an action for the recovery of a quarterly payment which became due after the bankruptcy.—*Parker vs. Ince*, 4 H. & N., 53; 28 Law J. Exchq., 189. And this was confirmed on appeal in the Exchequer Chamber, the Court of Errors from the English Court of Exchequer.

Where a defendant executed a bond whereby he became liable as a surety to pay such costs as the plaintiff should in due course of law be liable to pay in an action then pending, the action was tried, and a verdict passed whereby the liability of the defendant accrued. The defendant became bankrupt in the November fol-



lowing, and subsequently obtained his certificate before the costs were taxed, and before final judgment was signed against the plaintiff in the action. It was held, that the plaintiff's claim was not barred by the defendant's certificate, the debt not being a contingent debt within the meaning of the English Bankrupt Acts, but only a contingent liability.—*Hankin vs. Bennett*, 14 Eng. Law and Eq. Rep., 403.

The uncertain and contingent demands which might be proved under the United States Bankrupt Act of 1841 did not include demands whose existence depended on a contingency, but existing demands, the cause of action upon which depended on a contingency.—*French vs. Morse*, 2 Gray, Mass., 111.

Under the Bankrupt Act of 1841, contingent demands which arose out of indorsements, bail, and other uncertain undertakings, might be proved under the bankruptcy; and where the claims became absolute, they were allowed to participate in the effects of the bankruptcy.—*McNeil vs. Knott*, 11 Geo., 142.

A joint debtor with a bankrupt has a contingent claim on the latter, which is provable under the bankruptcy; and the bankrupt's certificate will bar a suit against him for contribution.—7 Blatch., 317.

Where it appears on the face of the bond to secure an annuity, that one of the obligators is surety only for the other, he is to be looked upon as a surety only, and not as a principal under the Bankrupt Law, and consequently his discharge under his bankruptcy will not release him from liability to pay the arrears of the annuity accruing after the bankruptcy, and unpaid by the principals.—*White vs. Corbett*, 28 Law Journ., Q. B., 228. Vide also *Thompson vs. Thompson*, 2 Bingh., N. C., 168; *Bennett vs. Barton*, 12 Ad. & E., 657.

The obligation to pay calls on shares does not create a debt payable on a contingency, but is a contingent liability.—*South Staffordshire Railway Co. vs. Burnside*, 5 Excheq., 129. Proofs upon contracts to replace stock upon a given day have been admitted.—*Ex parte Day*, 7 Ves., 301. Proof has been admitted, under the bankrupt's covenant, with trustees to assign stock in the funds to them for the benefit of the wife upon request.—16 Ves., 244.

A debtor assigned to his creditor a claim on a third person, and guaranteed that if such claim could not be recovered from the person indebted he would pay the amount, with the charges thereon. Held, that this claim of the creditor on the contract of guarantee was provable against the debtor's estate, and that his discharge under his bankruptcy would bar the same.—*Stone vs. Miller*, 16 Penn. State Rep., 4 Harris, 450.

**Children's Earnings.**—When a child has earned money by its labor, and deposited the money with the father, who has become bankrupt, it will be allowed to prove for such amount, *ex parte Kronklin*, 6 Vesey, 675; but there must be very cogent evidence to avoid fraud.—1 Ves. & Beames, 48.

**Composition Deed.**—When a creditor had agreed with his debtor to take a composition, to be paid by installments, and after payment

of the first installment the debtor became bankrupt, Lord Hardwicke, then chancellor, thought that the creditor should be admitted to prove the whole of the original debt, and not the amount of the composition only, *Eq. Cases Abr.*, 28; *Sewell vs. Musson*, 1 Vernon, 240; *Heathcote vs. Crookshanks*, 2 Term Rep., 24; and this is now the rule in the English courts.

**Damages.**—Where the damages have been ascertained by verdict and judgment, they are provable; when not ascertained, and unliquidated, where the damages arise out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld by the bankrupt, the court, as before observed, may cause the damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved. The court would probably in some cases order the assessment by a jury. The bankrupt's discharge would be a bar to an action for breach of promise of marriage made before his bankruptcy. The words of the section are large, *any "contract or promise,"* and there is no exception or limitation in the act.

**Equitable debts** may be proved.—3 Ves., L. B., 40; 2 Rose, 196.

**Husband and Wife.**—If a woman be indebted, and she marries, and her husband becomes bankrupt, her debts are provable under his estate.—*Miles vs. Williams*, 10 Mod., 243.

**Executor, Proof by.**—An executor may prove a debt due to the testator, and also an administrator, who must produce the letters of administration.

**Executor when Bankrupt.**—A vested legacy may be proved by the legatee against an executor bankrupt who has received or admitted assets.—1 Cooke, Bank. L., 483. If an executor misapply the assets of the testator, the amount of the devastavit may be proved.—S. C. Proof against the estate of a husband of an executrix, where, in a joint bill filed against them, they had admitted assets, was allowed.—1 Sch. & L., 173.

Although the fact of bankruptcy would not bar the recovery of specific property held by the bankrupt in his character of executor, yet it would bar the recovery by the distributees of money received by him, and for which he was liable as executor before his bankruptcy.—*Waller vs. Edwards*, 6 Litt., 348.

**Marriage Settlements.**—Marriage being in law and equity a valuable consideration, contracts made upon marriage, or after marriage, if contracted for before, to pay money to trustees, create debts provable under the bankruptcy of the husband. A bond or covenant by the husband to pay or vest in trustees during his lifetime a sum of money for the benefit of his wife and children, is provable; *ex parte Campbell*, 16 Ves., 234; *ex parte Gardner*, 11 Ves., 40; *Shaw vs. Sakeman*, 4 East., 201; or a covenant to pay or invest it upon the death of himself or his wife, whichever should first happen, *Brandon vs. Brandon*, 2 Wils., C. C., 14; or upon the death of the husband, with interest in the mean time; and if default be made in payment of the interest before his bankruptcy, such debt is provable.—*Ex parte Elder*, 2 Madd., 282.

A trader about to be married, and being, in fact, insolvent, of which insolvency the intended wife was ignorant, entered into a covenant with trustees to pay them a sum of money, the interest of such sum to be paid to the wife's appointment. Some property of the wife was also agreed to be settled upon the same trusts. The husband became bankrupt, and the trustees applied to prove under the bankruptcy for the amount, which, in fact, had never been paid by the bankrupt under his covenant. The commissioner rejected the proof. Held, on appeal, that the settlement was good as against the assignees, and that the trustees were entitled to prove under his bankruptcy.—*In re M'Birnie*, 13 Eng. Law and Eq. Rep., 479.

**Judgments.**—A judgment in an action of tort recovered against one who afterward becomes bankrupt is provable, and is barred by the defendant's final discharge.—*Comstock vs. Grout*, 17 Vermont, 512.

**Mutual Debts and Mutual Credits.**—In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature *not provable* against the estate. This provision is the same as in the English Bankrupt Acts. The object of the enactment is, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account is to be settled between them, and the balance only be payable on either side. Such account is to be stated and settled as between merchant and merchant, and upon that principle only. See the judgment of Tindal, C. J., *Gibson vs. Bell*, 1 Bing., N. C., 768. There must be a mutual credit existing *at the time* of the bankruptcy.

It will be perceived that the right of set-off is not confined to mutual *debts*, but extends to cases of *mutual credits*; i. e., cases where that which will terminate in a debt exists on both sides.—*Groom vs. West*, 8 Ad. & E., 758. An accommodation indorser who has paid the amount for the bankrupt since the bankruptcy may set it off, *Hulme vs. Mugglestone*, 3 Mees & W., as also an accommodation acceptor.—*Russell vs. Bell*, 8 Mees & W., 277. If the credit given by the bankrupt existed before the bankruptcy, or before notice of an act of bankruptcy, it is sufficient, although the debt due to the bankrupt's estate arising from such credit may not have accrued till afterward.—*Bittlestone vs. Temmis*, 1 C. B., 389. But where a bill is deposited, not in order to create a debt, but for some specific purpose, this is not a credit, and can not be set off.—*Alsager vs. Currie*, 12 Mees & W., 758. A guarantee, being merely a contract to indemnify against contingent damages, will not form the subject of a mutual credit.—*Rose vs. Sims*, 1 B. & Ad., 521. There is a distinction between the right of set-off in bankruptcy and the ordinary right of set-off at law. Under the former, the object is that substantial equitable justice shall be done, and under the latter, the object is to prevent cross actions between the parties. In bankruptcy the right depends, not merely on the legal,

but on the beneficial interest. Debits to be set off, must be due in the *same right*; therefore a debt due to an executor can not be set off against a debt due from him in his own right.—10 Bing., 310; Bishop vs. Church, 3 Atk., 601. In actions for unliquidated damages there can be no plea of set-off or mutual credit.—Bell vs. Carey, 8 C. B., 887. Vide Alsager vs. Currie, 11 Mees & W., 14, where the law upon this point is elaborately stated. The claim to be set off must be one of a nature provable under the bankrupt's estate. A party can not avail himself of his own wrongful act to establish a mutual credit within the meaning of this section, as when an attorney, with whom bills of exchange have been deposited for a specific purpose, detains them against good faith.—Buchanan vs. Findlay, 9 B. & C., 738. There is no provision in this section, as in the English acts, that the person claiming the benefit of such set-off had not, when such credit was given, notice of any act of bankruptcy committed by the bankrupt; and the question may arise whether, in the absence of such a statutory restriction, notice of an act of bankruptcy will invalidate the claim. If the claim must be of a nature provable, it can not be provable if the party claiming had notice at the time it arose that an act of bankruptcy had been committed. The well-known policy of the Bankrupt Law would invalidate it.

An accommodation acceptance is a credit given by the acceptor to the party accommodated; and an accommodation indorser, who pays the amount after the bankruptcy, may set it off.—Hulme vs. Muggelstone, 3 Mees & W., 30. An agreement to pay the bankrupt for goods sold, prompt payment in two months, or by acceptance, is a claim against which a debt due from the bankrupt may be set off.—Groom vs. West, 8 Ad. & E., 758.

Mutual credits are credits which must either terminate in debts, or have a natural tendency to terminate in debts, not claims differing in nature from a debt.—Rose vs. Hart, 8 Taunt., 499; 2 Smith's Leading Cases, 179. If the credit be given before notice of any act of bankruptcy, or before the filing of the petition, the accrual of the debt afterward will be immaterial. Where a debtor to the estate of a bankrupt has a fair subject of set-off against the assignees, he is not to be deprived of it. Where the bankrupt agreed to set off a debt owing to him against a debt he owed to the debtor's brother, and had actually set off such debt in his books, it was held to bar the claim of the assignees to the debt.—Cuxun vs. Chadley, 1 C. & P., 174; 10 Bing., 310. A landlord may set off rent due from the bankrupt against a claim by the assignees for improvements and machinery put up by the bankrupt on the demised premises.—*Ex parte* Hanson, 3 De Gex & J., 92. Vide also 27 L. J. Bank., 40. Where there are mutual dealings between A and B, and A having the property of B in his hands, B becomes bankrupt, A is entitled to set off his debts or demands against the funds in his hands, and can be compelled to account to the assignees of the bankrupt for the balance only; even though the subject of the set-off would not be admissible at law.—Murray vs. Riggs, 15 Johns., 571. A joint debt

might be set off against the separate claim of the assignee of one of the parties, but such set-off could not have been made at law independently of the statute.—*Tuckers vs. Oxley*, 5 Cranch, 34.

The set-off allowed under the Bankrupt Law of 1841, in case of bankruptcy, is not confined to pecuniary demands, but extends to all cases where the creditor has goods of the debtor in his hands, which can be reached only by a suit at law or in equity.—*Murray vs. Riggs*, 15 Johns. Rep., 571.

For a luminous history of this part of the Bankrupt Law and the principles which should govern decisions upon the subject, the reader is referred to the judgment of the Chief Justice of the Court of Queen's Bench in the case of *Groom vs. West*, 8 Ad. & E., 758, and also to the case of *Gibson vs. Bell*, 1 Bing., N. C., 743. The distinctions are sometimes very nice, for mere liabilities which may or may not become debts are not within the section.—*Abbott vs. Hicks*, 5 Bing., N. C., 578.

**No Set-off to be allowed in Favor of any Debtor to the Bankrupt of a Claim purchased by or transferred to him after the Filing of the Petition.**—This provision is stringent in its terms, and even without notice to the transferee of the filing of the petition, which in its inception is entirely an *ex parte* proceeding, the right of set-off is extinguished.

**Joint and Separate Claims—Partnership Debts.**—There are some peculiar considerations applicable to the proof of debts where a firm has wholly, or in part, become involved in bankruptcy.

The question—sometimes one of great nicety—frequently arises, whether the proof is to be made under the joint or the separate estate of two or more bankrupt partners. The joint estate is sometimes hopelessly insolvent, when the separate estate of a partner will realize a large dividend, and the converse. The *joint* estate is that in which the partners are jointly interested for the purposes of partnership at the time of the bankruptcy. The *separate* estate is that in which the partners are each separately interested at the time of the bankruptcy. It is not unusual to confine the term “separate estate” to that part of the bankrupt partner's property which is distinct from, and unconnected with the partnership. But it may be applied to property used for the purpose of the partnership, if it belongs to one or more partners to the exclusion of the others. Separate debts are those for which the creditor has a remedy at law against such partner only as contracted them. Joint debts, and which must be proved under the joint estate only, are those for which the creditor in any action at law must have made all the partners defendants.

The general rule as to the application of the joint and separate property to the payment of the creditors is, that the joint estate shall be applied to the joint debts, the separate to the separate debts, and the surplus of each estate reciprocally to the creditors remaining on the other—this rule being subject to the exceptions which have been before noticed.

A joint debt might be proved under a separate estate, and a full

dividend received under the Bankrupt Law of 1841. Equity alone can restrain the joint creditor from receiving his full dividend until the joint effects are exhausted.—*Tucker vs. Oxley*, 5 Cranch., 34. And under the same law a joint debt might be set off against the separate claim of the assignee of one of the partners, but such set-off could not have been made at law independent of the Bankrupt Law. It was decided by Chancellor Kent, that a joint bankruptcy against partners can not be maintained after a separate commission against one partner, nor a separate commission after a joint commission. And it would seem that the assignees under a separate commission were entitled to a distribution of the joint as well as the separate estate.—*Murray vs. Murray*, 5 Johns. Chan. Rep., 60.

**Bills and Notes of Bankrupt Partners.**—A note was issued by a bank in this form: "I promise to pay the bearer on demand fifty pounds for A, B, C, and D" (the partners). Signed A (one of the partners). The question arose whether proof upon this note should be made under the joint estate of all the partners, or under the separate estate of the partner signing. It was held, that the holder of the note had no separate right of action against A, and that his proof should be made under the joint estate.—14 Mees & W., 469; 15 Law J. Bank. C., 3. Two of six partners who had given a confidential clerk a general authority in writing to sign bills and notes on behalf of the firm, directed the clerk to sign four promissory notes in the name of the firm, payable respectively to one or the other of the two partners who claimed to be creditors of the aggregate firm, in respect of an excess of capital advanced by them for the purposes of the partnership. The two partners afterward indorsed the notes to a separate creditor for a private debt of one of the two. Held, that although, as between these two partners and the other members of the firm, the notes were unjustifiably created and possessed by the two, yet, in the absence of all fraud or connivance in the transaction by the party to whom the notes were indorsed, the firm of the six were liable for the amount; and that on the bankruptcy of the firm, the holder of the notes had a right to prove the amount of them against the joint estate.—*Ex parte Bushell*, 3 Mont., D. & D., 615; 8 Jurist, 937.

**Election to prove under joint or separate Estate.**—The English decisions have established a principle which has, however, frequently been questioned, that where a creditor holds both joint and separate security of bankrupt partners, he must elect against which estate he will prove. See the cases collected, *Eden on Bankruptcy*, 181; *ex parte Husband*, 2 Glyn & J., 4; *ex parte Law*, 3 Deac., 541. Joint creditors may prove against the separate estates, where there is no joint estate, and no solvent partner; but these conditions must be very strictly observed; for if there be a joint estate however small, or any fund applicable to the payment of the joint debts, the creditors of the joint estate can not compete with those of the separate estate.—*Ex parte Kennedy*, 2 Mont., D. & D., 228; 2 Rose, 54; *ex parte Banerman*, 3 Deac., 476. And this rule applies to the case of co-contractors as well as partners.—2 Mont., D. & D., 283.

Joint creditors may also prove under the separate estate, where there are no separate debts, and, which is the same thing, where the joint creditors undertake to pay them.—*Ex parte* Hubbard, 13 Ves., 434.

**Partners—Proof by Partners on the Estate of each other.**—It sometimes happens that a partner is indebted to the firm, or the firm to one of the partners; in such case the rule is, that an individual partner can not prove against the joint estate in competition with the joint creditors; for as they are his own creditors also, he has no right to withhold any part of the funds available for the payment of their debts; nor can those partners of a firm who remain solvent prove against the separate estate of a member of the same firm in competition with his separate creditors, unless the joint creditors are first paid in full, and with interest; for they might, by doing so, prevent a surplus of the separate estate from accruing, which would be available toward the payment of the joint creditors.—*Ex parte* Reeve, 9 Ves., 558; *ex parte* Broome, 1 Rose, 69. If the solvent partner pay all the joint debts, he may then prove against the separate estate in competition with the separate creditors of his bankrupt copartner. In such a case, he would come under the definition of a person liable for the debt of the bankrupt. But there must be an actual satisfaction of the joint debts by paying the whole, or part, in discharge of the whole. Nothing less will be sufficient.—*Ex parte* Moore, 2 Glyn & J., 166; *ex parte* Carter, 3 Glyn & J., 233; *ex parte* Ellis, 2 Glyn & J., 312. Where a solvent partner pays all the joint debts, and proves against the separate estates of his copartners (more than one having become bankrupt) for the respective sums each is bound to contribute, it is a question whether, if the estate of one is insufficient to pay his share of the debts, the solvent partner can have recourse to the other bankrupt's estate for his proportion of the deficiency. Lord Eldon, then lord chancellor, thought he might. The master of the rolls dissented. Proof is only equivalent to payment when it produces payment.

**Proofs between Estates.**—In bankruptcy the estate of one partner, by the assignees, frequently have to prove upon the estate of the other, the joint upon the separate, and the converse. The rules as to proofs by partners above noted are applicable. An example is, where one partner has fraudulently drawn from the account at the bank money deposited by the firm, the sum so drawn out may be considered as money stolen from the joint estate, and would be provable by the joint estate against his separate estate.—*Ex parte* Graham, 2 Mont., D. & D., 781; *ex parte* Smith, 1 Glyn & J., 74; *ex parte* Watkins, 1 Mont. & Mac., 157. This right depends upon the ground of fraud in violation of the contract of partnership, and such case must depend upon its own peculiar circumstances. Contribution between the estates of bankrupt partners is allowed where one has been subject to an undue proportion of a charge which ought to have fallen equally upon both or all.—*Ex parte* Willcock, 2 Rose, 392; *Rogers vs. Mackenzie*, 4 Ves., 752.

**Rent.**—Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the section provides that the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew from day to day, and not at such fixed and stated periods. The landlord may therefore prove for the amount of rent due at the time of the bankruptcy, without reference to the period at which, by the lease or contract of tenancy, it would fall due. In those States where the right to distrain for rent in arrear exists, the English decisions upon this subject will be applicable. As long as the goods remain on the demised premises, the landlord will have the right to distrain, notwithstanding the bankruptcy of his lessee or tenant, and may realize all the arrears due under such distress.—*Ex parte Burly*, 22 L. J. Bank, 26. If, however, the landlord neglect to use his right of distress, he can only come in and prove under the estate with the other creditors. If a landlord distrains *after the bankruptcy* upon the tenant's goods, he can not prove under the estate also; he must elect to distrain or to prove; but if he has distrained *before the bankruptcy*, and such distress does not realize the arrears of rent due, he may then come in and prove for the deficiency.

Where a tenant, after an act of bankruptcy, under threat of distress by his landlord, paid the rent due, such payment was protected, and the assignees were held not to be entitled to recover it back from the landlord.—*Stephenson vs. Wood*, 5 Esp., 200. If, however, the landlord neglect to use his right of distress, and the assignees remove the goods of the bankrupt tenant, he can then only come in with the other creditors and prove under the estate.—*Ex parte Devisme*, Cook's Bank. Law, 190. After a petition has been presented for the benefit of the Bankrupt Law, and before the applicant has been declared a bankrupt, his goods found upon demised premises may be distrained, and sold by his landlord for the payment of his rent.—*Butler vs. Morgan*, 8 Watts & Serg., 53.

**Proofs by Creditors holding Security.**—A creditor holding a mortgage, or pledge of real or personal property of the bankrupt, or who has a lien thereon for securing the payment of a debt owing from the bankrupt, is admitted as a creditor only for the balance of the debt after deducting the value of the property, such value to be ascertained by agreement between him and the assignee, or by a sale as the court may direct.

The creditor has the option of releasing his claim upon the property and proving the whole debt. If the value of the property held by the creditor as security exceeds the debt, the assignee may release the bankrupt's right to redeem the property on receiving the excess. He may sell the property subject to the creditor's claim; all necessary deeds are to be executed; but the creditor holding such security exceeding the amount of the debt is not allowed to prove any part of his debt until such property is released or delivered up. A creditor holding security must be careful not to prove for the whole of his debt, but follow the course prescribed by the section. A creditor proving for the whole debt without regard to



his security, whether it be a mortgage or a lien, has been held to have abandoned his security by electing to prove, and permission to withdraw such proof and assert his right to the security has been refused.—*Ex parte* Spottiswoode, 1 Fonb., 20; *ex parte* Solomon, 1 Glyn & J., 25. The security must be realized or given up, before proof to receive a dividend will be allowed; but it may be valued, in order to allow proof for the surplus for the choice of assignees.—*Ex parte* Nunn, 1 Rose, 322. The provisions of the section only apply to securities on the estate of the bankrupt. The creditor may retain the security given by a third person for the bankrupt's debt, or a joint security by the bankrupt and a third person, *ex parte* Bennett, 2 Atk., 528, and even the security of the wife of the bankrupt, *ex parte* Heddlesley, 2 Mont., D. & D., 487; and in this case the creditor, holding the estate of the wife as security for the bankrupt husband's debt, was allowed to prove for the whole debt; and it was held that it was incumbent on him to prove on the bankrupt's estate for the whole debt before resorting to the wife's property.

**Mortgages and Pledges.**—A legal mortgage gives the mortgagee a right to retain the property mortgaged until his debt is satisfied, and the assignee can not redeem without paying all arrears of interest up to the time of redemption.—*Ex parte* Barnes, 3 Deac., 223. An equitable mortgage, which is created by the deposit of deeds without the execution of any deed, is also upheld in Courts of Bankruptcy; and where an equitable mortgagee has received the rents and profits of the bankrupt's estate, he can not be forced to refund to the assignees of the bankrupt mortgagor.—*Garry vs. Sharratt*, 10 B. & C., 716. A pledge of personal property is in the nature of a mortgage, and subject to the same rules.

**Liens.**—Whatever liens exist against the bankrupt, legally and equitably, are available against his assignees; such as the vendor's legal lien on a thing sold, but not paid for, or the right of a vendor of real estate to a lien for the unpaid purchase-money. But a contract made by a bankrupt that in case of his bankruptcy certain goods should become the property of other persons if they should so choose, is not binding on the assignees, because a bankrupt can not make a contract which would have the effect of vesting in others after his bankruptcy the property which, on his bankruptcy, became by statute vested in his assignees.—*Tripp vs. Armitage*, 4 M. & W., 699; *Hawthorne vs. Newcastle Railway*, 3 Q. B., 734. To render the security valid, the creditor must have acquired it *bond fide*, and without notice of any act of bankruptcy. In the administration under bankruptcy, the joint and separate estates are considered as distinct estates. A joint creditor having a security upon the separate estate of one of the partners, is entitled to prove under the joint estate without giving up his security, on the ground that it is a different estate.—*Ex parte* Peacock, 2 Glyn & J., 27; *ex parte* Bowden, 1 Deac. & C., 135, and the converse. A creditor whose debt was secured by the joint and several covenants of two partners in trade, and also by a mortgage on part of the joint property, was admitted to prove his debt against the separate estate of each,

without surrendering or realizing his mortgage security.—*Ex parte Plummer*, 2 Mont., D. & D., 204. Where a partner who has given a separate security for a joint debt becomes bankrupt, the creditor may realize by sale under the order of the court, but can only have the right to prove for the deficiency. In this case the other partners remained solvent.—*Ex parte Leicester Banking Company*, 1 De Gex, 292. A creditor holding security is entitled to apply it in discharge of whatever liability of the bankrupt he may elect, unless a contract, or a course of dealing between the parties, regulate the application of the proceeds in a particular manner, and thus satisfy a particular debt.—*Ex parte Johnson*, 3 De Gex; *Mac. & G.*, 218; 6 Ves., 94.

**Sureties.**—Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, is entitled to prove such debt, or after payment to stand in the place of the creditor if he shall have proved the same, although such payment shall have been made after the commencement of the proceedings in bankruptcy. The liability of a surety, as between himself and the bankrupt, arises from a contract to pay a debt or damages for the bankrupt which is the debt of the latter, and which, by express or implied contract, the bankrupt ought to pay; as, for instance, the acceptor of a bill of exchange for the accommodation of the bankrupt drawer.—*Stedman vs. Martine*, 13 East., 427. But where a party is surety with the bankrupt for the debt of another person, he can not prove until he has paid the debt, because he could not sue his co-surety for contribution until he has done so.—*Clements vs. Langley*, 5 B. & Adol., 372; *Wallis vs. Swinburne*, 1 Exchq., 203. The word "liability" is larger than the word "surety," and in the English courts has been the subject of much discussion. The jurisdiction in bankruptcy being in its character both legal and equitable, a party who is in equity surety for another is within the section, though at law he and that other may be both principals. For instance, a solvent partner who has paid the partnership debts is "liable" for his bankrupt copartner, and may prove, though he could not have maintained an action at law.—*Affalo vs. Fourdrinier*, 6 Bing., 306. The suretiship must have commenced before notice of the bankruptcy, but a renewal of a suretiship, as by accepting a new bill after the bankruptcy in renewal of that which constituted the original liability, will suffice. In consequence of this section, the bankrupt's discharge will release him not only from the principal debt, for which the surety is liable and has paid, but from all special damage sustained in consequence of the surety's liability.—*Vansandau vs. Corsbie*, 8 Taunt., 550; 3 B. & Ald., 13.

Sureties are generally entitled, upon payment of the debt by the principal, to the securities held by the creditor; but in bankruptcy, if the creditor hold a security upon the bankrupt's own property, he can not prove his debt without surrendering the security, or having it valued, and proving for the balance as before mentioned. If the creditor hold the security of a third person, he may

prove his debt without surrendering it, and may enforce such security against such third person, provided he does not thereby receive more than his claim.—*In re Babcock*, 3 Story, 393.

A surety in a custom-house bond who paid the debt before the principal became bankrupt is merely entitled to preference out of the estate, and can not maintain an action against the principal after he has obtained his certificate.—*Reed vs. Emory*, 1 S. & R., 339.

A surety of a bankrupt, if he had no cross security, or had not paid the debt before the bankruptcy of the principal, could not prove under the bankrupt's estate.—*Selfridge vs. Gill*, 4 Mass., 98; *Barclay vs. Carson*, 2 Hayward, 244. Vide 2 Dallas, 36.

**Stock Exchange Transactions.**—Transactions on the Stock Exchange, where they are mere contracts for time, or otherwise gambling transactions, are not provable upon the ground of public policy.—*Ex parte Phillips*, 2 L. J., N. S., 637; 3 L. J., 516; 6 Jur., N. S., 1273.

**Trustee.**—Where a bankrupt, who is executor or trustee, has applied the trust property to his own use, he ought not to be permitted to prove the amount against his own estate; but a legatee may prove on behalf of himself and the other legatees, with a direction that any dividends received be paid to the proper account.—3 Mont., D. & D., 361; 1 *id.*, 497; 2 Rose, 413.

**Wages.**—The reader is referred to the notes to Sections 27 and 28. Any operative, clerk, or house-servant is entitled to be paid his wages in full, *not exceeding fifty dollars*, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy. This payment in full is not to be made out of the *first* moneys got in, but as soon as there is a sufficient fund for the purpose, after providing for all the expenses necessary for working the bankruptcy.—*Ex parte Hampson*, 2 Mont., D. & D., 462; 6 Jur., 376.

## EFFECT OF PROOF.

SECTION 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the

bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid. If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

Proof of a debt is considered an election not to proceed against a bankrupt by action. Such proof operates as a statutable discontinuance of all actions and suits in respect of the same claim and demand, and is a waiver of all other legal and equitable remedies in respect of the debt proved. In the English courts an application may be made for an injunction to restrain the action by the creditor who has proved, or to expunge the proof.—*Ex parte Diack*, 2 Mont. & Ayr., 675; *ex parte Bernasconi*, 2 Glyn & J., 381. And this section provides, that all proceedings which may have been commenced by the creditor, who afterward proves his debt or claim, and all unsatisfied judgments obtained in any suits, are deemed to be discharged and surrendered by the fact of proof.

Under the United States Bankrupt Law of 1841 it was held, that the District Court, upon the application of the bankrupt or his assignees before the discharge is granted, may issue an injunction to

the creditor staying the proceedings until the further order of the court; and if the creditor, his agents or attorneys, proceed in the suit notwithstanding the injunction, they are liable to be committed for contempt. If the bankrupt does not obtain his discharge, the creditor may petition for a dissolution of the injunction, and, if it is granted, he may then proceed in his suit to judgment and execution. If the bankrupt obtains his discharge, and pleads it in bar to the further maintenance of the act, and the creditor intends to contest its validity on the trial in the State Court, he should apply to the District Court for leave to do so. If the validity of the discharge as such is not contested, and the State Court on demurrer should hold the discharge invalid as to the property attached, and the creditor proceeds to judgment and execution, the District Court would enjoin the sheriff from levying on the property, and order him to deliver the same to the assignee, or, if it has been sold, to bring the proceeds into court.—*In re Bellows & Peck*, 3 Story, 428.

The Bankrupt Law of the United States of 1841 contemplated that a creditor might maintain a suit in a State Court upon a demand provable in bankruptcy, although the debtor might have filed his petition to be declared a bankrupt.—*Hobart vs. Haskell*, 14 N. H., 127.

A judgment creditor could not pursue a bankrupt by bill after he had proved his debt in bankruptcy, nor could he allege that he proved the debt for the purpose of defeating the discharge, and not for receiving a dividend. By proving the debt, the creditor elects to become a party to the proceedings in bankruptcy, surrenders his judgment, and can receive but a dividend.—*Hoxton vs. Corse*, 4 Ed. Ch., 585.

Where a creditor levied an execution upon property acquired by a debtor after he had been decreed a bankrupt, and before it had been decided whether his certificate of discharge should be granted, a Court of Equity interfered by injunction to protect his rights, and restrained proceedings under the execution until the question of his discharge was decided.—*Mosby vs. Steele*, 7 Ala., 299. And in the same case it was held, that the State, and not the Federal Court, is the proper tribunal to afford relief in such a case.

A creditor who took a dividend under the estate of a bankrupt surrendered to the assignee under a petition filed by him in bankruptcy, was not thereby estopped from collecting the remainder of his debt, if the debtor failed to get his certificate of discharge under his bankruptcy.—*Hamlin vs. Hamlin*, 3 Jones Eq. Rep., N. C., 191.

**No Action for Debt provable to be prosecuted to final Judgment.**—The section provides, that no creditor whose debt is *provable* under the act is to be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of his discharge under the bankruptcy shall have been determined. The bankrupt may apply to the District Court for an order in the form of an injunction upon the creditor to restrain the prosecution of such action or suit, until the question of his right to his

discharge under the bankruptcy has been determined by the court. There must be no unreasonable delay on the part of the bankrupt in his endeavor to obtain his discharge. If there should be, the creditor should apply to the court to dissolve the injunction staying the proceedings in his action. By leave of the court, if the amount due to the creditor is disputed, he may proceed to judgment in his suit for the purpose of ascertaining the amount due; and when that amount is ascertained by the judgment, he may prove such judgment under the estate, but execution upon the judgment will be stayed. If the bankrupt obtains his order of discharge, he can plead it in answer to the action in the manner pointed out in the notes, title "Bankrupt's Order of Discharge." If the bankrupt does *not* obtain his order of discharge under the bankruptcy, the creditor will have the right to have the injunction dissolved, and to continue his action, and have his remedy under the execution in the court in which the suit is pending.

If the bankrupt is in custody at the suit of the creditor who had proved his debt, the court, upon petition, will order him to be discharged, and make the creditor pay the costs. A creditor who has the bankrupt in execution at the time of the adjudication, has his election either to continue to hold the bankrupt in execution, or to come in under the bankruptcy; but, in the latter case, he must discharge the bankrupt. If the creditor take the bankrupt in execution after the adjudication, it is an election; and although the bankrupt is discharged from custody, the debt is satisfied, and the creditor will not be admitted to prove.—*Ex parte Hicklin*, 1 Cook, 156; *ex parte Bisson*, *id.*, 157; 13 Ves., 183.

It will not fail to be observed that the debt or claim in respect of which the creditor is not allowed to prosecute a suit to final adjudication must be of a nature *provable* under the bankruptcy. Actions of tort, such as for assault, libel, slander, malicious prosecution, negligence as the cause of accident, *et ejusdem generis*, not being provable before judgment has been obtained, may proceed, notwithstanding an adjudication in bankruptcy.

**Proof where Bankrupt liable on distinct Contracts.**—If any bankrupt, at the time of his adjudication, is liable upon any bill of exchange, promissory note, or other obligation in respect of *distinct contracts*, as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the creditor may prove in respect of each distinct contract against the estate respectively liable upon such contract, and may receive the dividends under each respective estate.

SECTION 22. *And be it further enacted,* That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial districts where such creditors, or either of them, reside, or before any commissioner of the Circuit Court authorized to administer oaths in any district. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath, or solemn affirmation, before the proper register or commissioner, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings under this act, and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim, or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor or assignee, or any action on the part of such creditor or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled, and no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true. Such oath, or solemn affirmation, shall be made by

the claimant testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge, or, if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive further pertinent evidence either for or against the admission of the claim. Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer. If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts, which books shall be open to the inspection of all the creditors. The court may, on the application of the assignee, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

**How Proofs are to be Made.**—Where creditors seeking to make proofs of debts against the estate of the bankrupt reside within the judicial district where the proceedings in bankruptcy are pending, the proof is to be made by deposition in writing on oath, or solemn affirmation, before one of the registers of the court in such district;



and in practice should be made before the register who is acting in the bankruptcy proceedings.

**Proofs by non-resident Creditors** may be made before any register in bankruptcy in the judicial district where such creditors, or either of them, reside, or before any commissioner of the Circuit Court authorized to administer oaths in any district. The form of the proof, and the statements required in it, are specifically set forth in the section, and will be embodied in the general rules and orders.

**Proof by Absent Creditor.**—If the creditor be absent from the United States, or be prevented by some other good cause from testifying when necessary to make such proof, the proof may be verified by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge.

**Proof by Creditor in a Foreign Country.**—A creditor abroad in a foreign country may make his deposition on oath before any minister, consul, or vice-consul of the United States.

**Proof by Corporations.**—Corporations may prove their claims by the oath or solemn affirmation of their president, cashier, or treasurer.

**Evidence in support of Proof.**—The court may, if it shall see fit, require further pertinent evidence either for or against the admission of the claim; and on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims; and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

**Proofs by Creditors holding Securities.**—This subject has been fully treated of. Vide Section 20, and notes.

**Delivery of Proofs to the Assignee.**—Where the proof is satisfactory to the register it is to be signed by the deponent, and to be delivered or sent by mail to the assignee, who is to examine the same, and compare it with the books and accounts of the bankrupt. A book is to be kept by the assignee, in which are to be registered by him the names of creditors who have proved their claims; the order in which such proofs have been received; the times of the receipt of such proof; and the amount and nature of the debts proved; and such book is to be open to the inspection of all the creditors.

**SECTION 23.** *And be it further enacted,* That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by

the assignee, he may postpone the proof of the claim until the assignee is chosen. Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers; and any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

**Proof of a Claim may be postponed.**—Before an assignee has been elected under the bankruptcy, and if the judge entertains doubts of the validity of a claim presented for proof, or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, such proof may be postponed until the assignee is chosen.

**Creditor who has accepted a Preference not to be admitted to Prove.**—Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom. As to what constitutes fraudulent preferences in violation of the Bankrupt Law, vide notes, title "Fraudulent Preference."

**List of Debts to be made.**—A list of all debts duly proved is to be made and certified by one of the registers.

**Creditor may act at Meetings by Attorney.**—Any creditor may act at all meetings by his duly constituted attorney the same as though he were personally present.

**SECTION 24.** *And be it further enacted,* That a supposed creditor who takes an appeal to the Circuit Court from the decision of the District Court, rejecting his claim in whole or in part, shall, upon entering his appeal in the Circuit Court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same substantial-

ly, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause as in an action at law, commenced and prosecuted in the usual manner in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court, or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

**Mode of Appeal by Creditor where Claim rejected.**—A creditor whose claim to prove under the estate has been rejected, in whole or in part, by any decision of the District Court, may appeal to the Circuit Court from such decision. A statement in writing of his claim, setting forth the same substantially, as in a declaration for the same cause of action at law, is to be filed in the office of the clerk of the District Court at the time that he enters his appeal. The section does not provide for any notice to be given to the assignee of this proceeding, but it is presumed that it will be required by some general order. The assignee is then to plead or answer in like manner, that is, to state in writing, and file in the clerk's office, substantially as in a plea to an action at law, the grounds upon which he relies for the rejection of the claim, so that some distinct issue can be raised from these mutual statements for the determination of the court. The final judgment of the court is to be conclusive, and the list of debts proved under the estate is, if necessary, to be altered to conform thereto.

**Costs of the Appeal.**—The party prevailing in the suit is entitled

to costs against the adverse party, to be taxed and recovered as in suits at law; and the costs, if recovered against the assignee, are to be allowed out of the bankrupt's estate. No execution can be had against the assignee.

**Documents used in Evidence upon Proof of Debts may be returned to Creditors.**—Any bill of exchange, promissory note, or other instrument which has been used as evidence in support of a proof or claim under a bankrupt's estate, and which may have been left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it in evidence, upon his filing a copy thereof, attested by the clerk of the court, and leaving such copy with him. The clerk is to indorse upon the document the name of the bankrupt's estate against which the debt has been proved, and the date and amount of any dividend declared thereon.

### PROPERTY PERISHABLE AND IN DISPUTE.

**SECTION 25.** *And be it further enacted,* That when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold in such manner as may be deemed most expedient, under the discretion of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of; and whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

This section gives the court authority, when any goods or property of the debtor which have been taken possession of by the messenger, or which are in the hands of the assignee, and is of a perishable nature or liable to deteriorate in value, to order the same to be sold, under the direction of the messenger or assignee, and the proceeds of such sale are to be treated and considered as a part of the bankrupt's estate to be administered under the bankruptcy.

**Disputed Title to Property.**—Where the title to any portion of the estate of a bankrupt, real or personal, which has come into the possession of the assignee, or which is claimed by him to belong to the estate, is in dispute, the court has power, on petition of the assignee, to order the sale of such property under his direction, and the proceeds of such sale are to be considered the measure of the value of such property in any suit or controversy between the parties in any courts. The requisite notice to be given to the claimant before proceeding to sale will probably be prescribed by the general rules and orders. If the claimant has commenced his action against the assignee for the recovery of the value of such property before the sale has been ordered by the court, the last provision of the section will not apply. If, however, such action be commenced after the court has ordered the sale, it would be stayed by an injunction.

## EXAMINATION OF THE BANKRUPT AND OTHER PERSONS.

SECTION 26. *And be it further enacted*, That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law, which examination shall be in writing, and shall be signed by the bankrupt, and be filed with the other proceedings; and the court may, in like manner, require the attendance of any other person as a witness, and if such person shall fail to attend, on being summoned thereto, the court may compel his attendance by warrant

directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as such witness. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailor, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been in court. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted to do so, with like effect as if he had not been in default. He shall also be at liberty, from time to time, upon oath to amend and correct his schedule of creditors and property, so that the same shall conform to the facts. For good cause shown, *the wife of* any bankrupt may be required to *attend* before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he

shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife. No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge or bankruptcy would not release him.

The power given to the court to examine the bankrupt at all times upon reasonable notice, is an important element in the administration of the Bankrupt Law, and without such power proceedings in bankruptcy in many cases would be ineffectual. The bankrupt is to be examined upon oath upon all matters relating to the disposal or condition of his property; upon all matters relating to his trade and dealings with others, and his accounts concerning the same; upon all matters relating to debts due or claimed from him; and to all other matters concerning his property and estate, and the due settlement thereof according to law. The words of this section are very comprehensive, and embody the former provisions upon this subject of the Bankrupt Act of 1841, and those also of the 12 & 13 Vict., chap. 106, § 117. Upon the examination of a bankrupt questions of difficulty frequently occur. The bankrupt, in the course of an examination as to the disposition of his property and the disclosure of his estate, may frequently render himself liable to penalties for fraudulent concealment, or that he has obtained property illegally acquired; and the English authorities cited in this note will perhaps afford some principle for the guidance of the court as to the questions which the bankrupt is compelled under his examination to answer. It would seem that a bankrupt is not bound to disclose the commission of any distinct criminal act, and he has been protected from answering such questions.—*Ex parte* Cossens, Buck, 531; *ex parte* Kirby, 1 Mont. & Mac., 212; *in re* Smith, 2 Deac. & Chit., 239; *ex parte* Hawley, 20 L. J., 258; 1 Deac. & Chit., 415; 2 *id.*, 465. But the bankrupt can not refuse to discover all his estate and effects, and the full particulars relating to them, though by giving such information his answers may tend to show that he has been guilty of fraudulent concealment, or that he owns property which he has obtained illegally, or the possession of which will render him liable to penalties.—*Ex parte* Cossens, Buck, 531; *ex parte* Caldecott, Mont., 55; *ex parte* Stone, 1 Glyn & J., 7.

The general rule of law, that no person can be compelled to criminate himself, has been said to be qualified with respect to the jurisdiction in bankruptcy, because a bankrupt can not refuse to discover his estate and effects, and the particulars relating to them, though, in the course of giving information as to what his property consists of, such information may tend to show that he has obtained property in violation of the law, as in the case of illegal trading.—*Ex parte* Cossens, Buck, 540. A bankrupt has been held bound

to answer a question relating to particular property, although an indictment was pending against him for the concealment of such property, *ex parte* Heath, 2 Deac. & Chit., 214; and in another case he was compelled to answer touching his estate and effects, although such answer might tend to convict him of perjury committed by him on a former occasion, and also be evidence against him that he had incurred penalties by concealing his effects.—*In re* Smith, 2 Deac. & Chit., 230; *in re* Feak, *id.*, 226.

The bankrupt can not object to answer questions tending to establish an act of bankruptcy committed by him.

The answer on which the bankrupt was committed being "that he could not recollect how he came to draw a certain check in a certain name," and the court, from the whole examination as set out in the warrant, perceiving that the substance of the inquiry was how he had disposed of the money, and that the name inserted in the check, and the object of inserting it, were material on that point, it was held that the committal was valid.—*In re* Bradbury, 25 Eng. Law and Eq. Rep., 252.

On the examination of a bankrupt, he is bound to answer as to matters necessarily within his knowledge, and which must, more or less, be in his recollection; as, for instance, the disposal of his money, and the drawing of bills, notes, or checks; and it is not sufficient for him to answer, as to such matters, that he does not recollect, if he gives no reason for his want of recollection, nor any information by which the court can pursue the investigation; and this applies as to questions upon minute points, or even to matters of intention or motive, if they are necessary to the investigation; and an answer may be direct and full which is not satisfactory, because not reasonable.

On an application by a bankrupt to be released who has been committed for not answering fully, the court will look to the whole of the examination set out in the warrant; and the proper course is, therefore, to set out therein as much as is necessary to show the relevancy and materiality of the questions for not answering which he is committed, especially if they are such as, *per se*, might appear unimportant. And if, on looking to the whole of what is set out, the court see that the question was material, and the answer was a mere denial of all recollection, without any reason or explanation, it will not be deemed full and satisfactory, and the committal is justifiable.

In order to justify the commitment of a bankrupt under this section for not fully answering questions to the satisfaction of the court, the examination should be full, fair, and searching, and not rambling or irrelevant.—*Ex parte* Legge, 17 Jur., 415; 22 L. J., Q. B., 345. Where a bankrupt on a second or subsequent examination states that he wishes to explain some of his former statements, but that he does not sufficiently recollect them, his memory should be refreshed by their being repeated to him. A bankrupt, on his examination before a commissioner, in answer to the question, "Not having kept any books, does your memory serve you as to how a



sum of money (the proceeds of a check drawn by the bankrupt payable to the Rev. W. B.) was appropriated?" the bankrupt gave what amounted to no answer—that he could not tell what had become of the proceeds, and saying "he did not remember," without giving any reason for not remembering, the court held that the commissioner was justified in committing the bankrupt to prison for not fully answering to his satisfaction.—*Ex parte Bradbury*, 18 Jur., 189.

**Confidential Communications to Counsel or Attorney.**—The question how far matters communicated by a bankrupt to his counsel or attorney are exempted from disclosure, may frequently arise under this section. The general principles on this subject apply just as much after the client's bankruptcy as before, and the assignees have no right to compel a counsel or attorney to disclose matters which are privileged communications, nor can he properly disclose them without the bankrupt's consent.—*Bowman vs. Norton*, 5 C. & P., 177; *in re Phillips*, 20 L. J., 16. It has been decided, where the question was whether the bankrupt had committed an act of bankruptcy by having made a fraudulent conveyance, that the attorney of the bankrupt, though, as attesting witness to the deed, he was bound to disclose what took place at the time of its execution, was privileged from stating what occurred during its concoction and preparation, and could not be asked whether it had not been subsequently destroyed, if the only knowledge he had as to these matters was acquired from his confidential character as an attorney.—*Russell vs. Jackson*, 21 L. J., Chan., 146. A commissioner in bankruptcy refused to compel the clerk of an attorney (who is within the rule as much as the attorney himself) who had been employed by the bankrupt in the preparation of a deed which was alleged to be a fraudulent preference, to give evidence as to the circumstances under which it was made, in support of an opposition to the bankrupt obtaining his certificate; and this decision of the commissioner was supported by the Appellate Court.—*In re Phillips*, 20 L. J., 15; *Turquand vs. Knight*, 2 Mees & W., 98; *ex parte Lord*, Buck, 110. But the legal adviser must disclose all questions put to him by his client, with the client's answers thereto, provided such questions were asked in order to gain information respecting matters of fact, as distinguished from those put with a view of obtaining advice.—*Bramwell vs. Lucas*, 2 B. & C., 743.

**Examination of the Bankrupt to be in Writing, and to be signed by him.**—The section prescribes, that the examination shall be in writing, and be signed by the bankrupt, and filed with the other proceedings. In the event of a bankrupt refusing to sign his examination, or refusing to answer questions legally and properly put to him, he is liable to be committed by the court for contempt; and many questions have arisen in England where the bankrupt has been committed to custody by a warrant from the judge in bankruptcy for refusing to answer, and has been brought before the Appellate Courts upon a writ of *habeas corpus*, upon the sufficiency and propriety of the answers given by him, and the questions put to

him upon his examination. Where the bankrupt has been committed upon a warrant for refusing to answer questions put under his examination, it has been held in the English courts, that the questions refused to be answered must be specified in the warrant of commitment. Vide *Ex parte* Bull, 15 L. J., Q. B., 235; *Ex parte* Dauncey, 4 Q. B., 668; 8 Per. & D., 640; 12 L. J., Q. B., 239; 12 Mees & W., 271; *Ex parte* Bull, 1 B. C. R., 132.

The bankrupt may be committed by the court for answers upon his examination which, on the whole, are unsatisfactory, and which do not really and truly disclose the disposition of his estate and effects, as where they were so clearly of an improbable character that they could not be believed.—*In re* Martin, 11 Jurist, 461; *ex parte* Lord, 11 Jurist, 186; 10 Mees & W., 462; 16 L. J., Exc., 118.

The courts before whom a bankrupt, who has been committed for refusing to answer, is brought upon a writ of *habeas*, in point of fact review the decisions of the judge in bankruptcy, and the whole examination of the bankrupt, and the particular questions put to him are brought up.

**Where the Bankrupt is in Prison, Absent, or unable to Attend.**—If the bankrupt is in prison, absent, or disabled from attendance, the court may order him to be produced by the jailor, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place, and in such manner as the court may deem proper, and with like effect, as if such examination had been had in court. As the power to commit a bankrupt is only vested in the court, in the event of the bankrupt refusing to answer questions properly put to him upon his examination, the register or other officer taking the examination must certify such facts to the court, and bring the bankrupt before the court in order to enforce such answers, or have him committed for contempt.

**Examination of other Persons under the Bankruptcy.**—The section provides that the court may, in like manner, require the attendance of any other person as a witness; and if such person shall fail to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy, for examination as such witness. This section does not provide in terms for the examination of witnesses under the bankruptcy who are capable of giving information concerning the person, trade, dealings, or estate of the bankrupt, or concerning any act of bankruptcy committed by him, or any information material to the full disclosure of his dealings, as the English Bankrupt Acts provide; but it is presumed, from the words of the section *in like manner*, that the intention of the act is to enable the court to examine witnesses upon all matters relating to the disposal or condition of the bankrupt's property, and to his trade and dealings, and to all matters concerning his estate, and the due settlement thereof, as fully and effectually as the bankrupt himself can be examined.

The party summoned as a witness can be compelled to answer

such questions only as relate to the subjects specified in the section; and it has been held, under the same power in the English Bankrupt Acts, that a question to ascertain the truth of a plea to an action which has been commenced by the assignees against the witness, is not authorized.—*Ex parte Solarte, Re Absedo*, 1 Mont., 495. And the penalty for refusing to be sworn, or sign the examination, or not answering satisfactorily, must be limited to the powers given by the words in the early part of the section. No express power is given by the section, to require the witness summoned to produce books, papers, deeds, writings, or other documents which may appear to the court necessary to the full disclosure of any of the matters which the court is authorized to inquire into, as the English Bankrupt Acts specially provide; but it is presumed that the court would have the inherent power to require their production, and, in the event of their non-production, to issue a warrant against the witness. It has been held, that a refusal on the part of a witness to read an entry in an account-book put into his hands by the examiner, was not such a refusal to answer a question within the meaning of the section of the English Bankrupt Acts before mentioned.—*Isaac vs. Impey*, 10 B. & C., 442.

**Bankrupt's Wife may be Examined.**—The section provides that, for good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; but it would seem, in the event of her neglect or refusal to attend, no power is conferred to compel her attendance by warrant, as in the case of other witnesses. The penalty of her non-attendance appears to be entirely thrown upon the bankrupt. The section providing that if the wife so required to attend does not attend at the time and place specified in the order, the bankrupt is not to be entitled to his discharge, unless he shall prove to the satisfaction of the court that he was unable to procure her attendance.

It is difficult to treat of this peculiar provision. It may subject the bankrupt to injustice and hardship on the one hand, and afford the opportunity for fraud and collusion on the other; and the question of what would constitute an inability on the part of a bankrupt to procure the attendance of his wife will be very difficult to decide.

“If she will, she will, you may depend on't;

And if she won't, she won't, and there's an end on't,”

is an old aphorism not wholly inapplicable in the present day to the gentler sex. The English Bankrupt Acts contain provisions giving the courts the power to summon the wife of the bankrupt, and to examine her compulsorily as the bankrupt and other witnesses can be examined. Should the wife attend, her examination must be strictly confined to the objects specified in the earlier part of the section, and it has been held, that it is a statutory power to be strictly limited, and that she can not be examined as to any act of bankruptcy committed by her husband.—*Ex parte James*, 1 P. Wms., 611.

**Obtaining the Order for Examination.**—Where the assignees or

creditors desire to have the bankrupt, or any other witness, personally examined for any of the objects specified in the section, an affidavit should be prepared, setting forth concisely the reason or necessity therefor, and presented to the court; and if the court is satisfied that a case is made out requiring such examination, an order will be entered, directing the time and place thereof. The same course will be pursued for an order from the court requiring the wife to attend, or perhaps in practice the bankrupt to produce her.

**The Bankrupt, until his Discharge, at all Times subject to the Order of the Court.**—This section provides that the bankrupt shall, at all times until his discharge, be subject to the order of the court; and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate; and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for contempt of court. These orders will be made of course by the court, unless the bankrupt disputes the validity of the adjudication.—1 Mont., D. & D., 118; *id.*, 667; 2 Deac., 479.

**The Bankrupt may Attend and Clear himself from Default, if not Willful.**—If the bankrupt is without the district, and unable to return and personally attend at any of the times, or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted to do so with like effect, as if he had not been in default.

**The Bankrupt may Amend or Correct his Schedule.**—The bankrupt shall be at liberty from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts. This provision should be carefully attended to by every bankrupt, because his discharge under the bankruptcy is invalidated by the Act if he has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory; and the opportunity being afforded him of amending and correcting his schedule, should be taken advantage of before his application for his discharge. The application to amend should be made immediately, or within a reasonable time after the facts rendering such an amendment necessary have come to his knowledge. Any willful delay or neglect would deprive him of the right.

**Bankrupt protected from Arrest in certain Civil Actions.**—No bankrupt shall be liable to arrest during the pendency of proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge under the bankruptcy would not release him. For every debt provable under the bankruptcy, and from which his discharge will release him, the bankrupt is protected from arrest during the pendency of the proceedings. He will remain liable to arrest according to the laws of each State for

any debt created by fraud or embezzlement, or by his defalcation as a public officer, executor, administrator, guardian, trustee, assignee, or factor, or while acting in any other fiduciary character; he will also remain liable to arrest according to the laws of each State for personal wrongs—as for false imprisonment, seduction, criminal conversation, injuries to character, for fraudulently contracting debts, or for removing and disposing of his property with intention to defraud his creditors.

A bankrupt was protected from arrest from the time of filing his application to be declared a bankrupt.—*State vs. Rollins*, 13 *Mis.*, 179.

The protection will extend to arrests under attachment for the non-payment of money, *ex parte Jeyes*, 3 *Deac. & Chit.*, 764; 3 *Mont.*, D & D., 309; and it has been held in England, to protect the bankrupt from arrest under an attachment in the Insolvent Debtors' Court for the non-payment of a balance due from the bankrupt as assignee under that act.—*Ex parte Barry*, 7 *Jur.*, 406. But it does not extend to the taking of the principal by his bail, for the bail are not creditors; and besides, in contemplation of law, he was in their custody the moment they became bail.—*Ex parte Leigh*, 1 *Glyn & J.*, 264. A bankrupt at large on bail is not in custody. Where a bankrupt is entitled to his discharge upon an arrest under the provisions of this section, he will be discharged also from all detainers lodged against him after such arrest took place; but if in custody at the time of the commencement of the proceedings, it is otherwise.—*Ex parte Goldie*, 2 *Rose*, 343; *ex parte Hawkins*, 4 *Ves.*, 691; *ex parte Ross*, 1 *Rose*, 260. The discharge of the bankrupt must be unconditional; the court will not impose terms that the bankrupt shall not bring an action, nor will the court order the costs for an application for the discharge to be paid out of the estate.—*Ex parte Helsby*, *Mont. & Bligh*, 79. The sheriff may retake a bankrupt upon an escape, and he would not be discharged under the provisions of this section.—*Anderson vs. Hampton*, 1 *B. & A.*, 308. Where the court orders the discharge of a bankrupt, the jailor or sheriff will be bound to release him, and no action will lie against him for an escape, as it would be an order made within the general jurisdiction of the court, and by its judicial authority.—*Thomas vs. Hudson*, 13 *Mees & W.*, 353, 816, 884; *Norton vs. Walker*, 3 *Excheq.*, 480.

The words of this section apply to arrests *during the pendency* of proceedings in bankruptcy; but where the bankrupt at the time of his adjudication has been arrested, and is in custody for a debt *provable* under the bankruptcy, it is presumed that the court would have authority to order his discharge.

**DISTRIBUTION OF THE BANKRUPT'S ESTATE.**

SECTION 27. *And be it further enacted,* That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full: *provided*, that any debt proved by any person liable as bail, surety, guarantor, or otherwise, for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon the request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall produce and file vouchers for all payments for which vouchers shall be required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding; also what debts or claims are yet undetermined, and stat-

ing what sum remains in his hands. At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one half in value of the creditors shall attend such meeting either in person or by attorney, it shall be the duty of the assignee so to determine. In case a dividend is ordered, the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

SECTION 28. *And be it further enacted,* That the like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money; and within two months after the same shall be so converted, the same shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires; and after the third meeting of creditors, no further meeting shall be called, unless ordered by the

court. If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which can not be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order. No dividend already declared shall be disturbed by reason of debts being subsequently proved; but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter. Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth of such account, and if found correct, he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case, on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thou-



sand dollars; and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him. If by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held. In the order for a dividend under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:

1st. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

2d. All debts due to the United States, and all taxes and assessments under the laws thereof.

3d. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.

4th. Wages due to any operative, clerk, or house-servant to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

5th. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *always provided*, that nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

**The Duties of the Assignee as to making, declaring, and paying the Dividend.**—These sections provide for the manner in which the dividends under the estate of the bankrupt are to be made, notified,

and paid by the assignees. In the order for a dividend the following claims are entitled to priority or preference, and are to be first paid *in full* in the following order:

1st. The fees, costs, and expenses of suits, and for the custody of property, as herein provided;

2d. All debts due to the United States, and all taxes and assessments under the laws thereof;

3d. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State;

4th. Wages due to any operative, clerk, or house-servant to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy;

5th. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed; always provided, that nothing contained in this act shall interfere with the assessment and collection of taxes by the United States or any State.

**Wages to Operatives, Clerks, or House-servants.**—To entitle an operative, clerk, or house-servant to be paid in full, not exceeding fifty dollars, the labor in respect of which the wages or salary are claimed must have been performed *within six months* next preceding the first publication of the notice of proceedings in bankruptcy. In the construction of the same clause under the English Bankrupt Acts, it has been held, that a servant hired for a year, at a certain sum payable weekly, is within the provision of the section.—*Ex parte* Collier, 4 Deac. & Chit., 520; *ex parte* Humphreys, 3 Deac. & Chit., 114. Also that a person engaged as a traveler by the bankrupt, at an annual salary, comes within the clause.—*Ex parte* Neal, Mont. & Mac., 194. So also the mate of a vessel at certain wages, hired by the master, who was also one of the owners.—*Ex parte* Homberg, 2 Mont., D. & D., 642; 17 Jurist, 198.

**Debts due to Persons who, by the Laws of the United States, are entitled to Priority or Preference.**—Under this category are included creditors who have paid money, as sureties of the bankrupt, to the government of the United States in consequence of his defalcation or default.

**Assignee to exhibit his Accounts.**—At the expiration of three months from the date of the adjudication of bankruptcy in any case, or earlier, if directed by the court, a general meeting of the creditors is to be called, at which the assignee is to attend, and report and exhibit to the court and the creditors accounts of all his receipts and payments, verified by his oath, and produce and file his vouchers for such payments; he is also then to submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained of all the property which has been recovered, and of the property outstanding; also what debts or claims are then undetermined, and a statement of what money remains in his hands.

**Creditors at such Meeting to determine the Amount of Dividends.**—If one third in value of the creditors (which must mean the creditors who have proved their debts under the estate) be present at such meeting, they are to determine whether any, and what part, of the net proceeds of the estate shall be divided among the creditors; if one third in value of the creditors do not attend such meeting, it is the duty of the assignee so to determine. Before determining what dividend is to be made, a sufficient sum is to be retained to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies.

**Duty of the Register when a Dividend is ordered.**—When a dividend is ordered, the register, within ten days after such meeting, is to prepare a list of creditors entitled to dividend, and is to calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled. A statement of such dividend is to be forwarded by the register by mail to every creditor.

**Payment of the Dividend to the Creditor.**—The creditor entitled to the dividend is to be paid such dividend by the assignee in such manner as the court may direct. The general rules and orders will prescribe the time and manner of paying dividends by assignees. The English Bankrupt Acts provide, that no action for any dividend shall be brought against any assignee by any creditor who shall have proved under the bankruptcy; but if the assignees refuse to pay any dividend, the Courts of Bankruptcy, upon petition by the creditor, may order such payment, with interest for the time that it shall have been withheld, and the costs of the application. If the assignee, after demand by the creditor, refuses or neglects to pay the dividend to which he is entitled, the proper course will be to petition the court, who will order the assignee to pay it, and make him personally liable to pay all the costs of such application. After a dividend had been declared, the creditor entitled to it requested the assignees by letter to send him the amount of his dividend in a post-office order, promising to send a receipt by return of post. The assignees sent no answer. It was held, that this was such a refusal to pay the dividend as entitled the creditor to an order upon petition, at the cost of the assignees personally.—*Ex parte Jackson*, 3 Mont., D. & D., 1.

**Second and final Dividends.**—The section provides for the conversion, by the assignee, of the estate and effects of the bankrupt into money, and for the making of the second and final dividends under the estate.

**Further Dividends.**—The assignees are to make further dividends in like manner as often as occasion may require; but after the third meeting of creditors called for the purpose of making the dividends, no further meeting is to be called, unless ordered by the court.

**Effect of Subsequent Proofs upon Dividend.**—No dividend already declared is to be disturbed by reason of debts being subsequently proved, but the creditors proving such debts are entitled to a divi-

dend equal to those already received by the other creditors before any further payment is made to the latter.

**Discharge of Assignee.**—Preparatory to the final dividend, the assignee is to submit his accounts to the court, and file them, and give notice to the creditors of such filing, and also give them notice that he will apply for the settlement of his accounts, and for a discharge from all liability as an assignee. The court, at the time specified in the notice, is to audit and pass the accounts of the assignee, who, if required by the court, is to be examined as to the truth of such accounts, and if they be found correct, the assignee will be discharged by the court from all liability as assignee.

**Allowance to the Assignee.**—In addition to the expenses necessarily incurred by the assignee in the execution of his trust, the assignee is to be entitled for his services on all moneys received and paid out by him to the following allowance:

For any sum not exceeding one thousand dollars, five per centum thereon;

For any larger sum not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars;

And for every larger sum, one per centum on the excess over five thousand.

**Assignee entitled to necessary Funds or Security.**—If, at any time, the assignee has not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he may refuse to proceed therein until the necessary funds are advanced, or satisfactorily secured to him.

**Assignee may sell Debts or other Property under Order of the Court.**—If, at any time, outstanding debts or other property due, or belonging to the estate of the bankrupt, can not be collected and received by the assignee without unreasonable or inconvenient delay and expense, the court, upon the application of the assignee, may direct a sale and assignment of such debts or property in such manner as may be most expedient. Vide former notes, title "Sale by the Assignees."

**Omission to hold Meetings for Dividend.**—If, by accident, mistake, or other cause, without fault of the assignee, the second and third meetings for making the dividends should not be held within the times limited by the section, the court may, upon motion of an interested party, order such meetings to be subsequently held, and these are to be as valid as if they had been held in strict compliance with the provisions of the section.

## THE BANKRUPT'S DISCHARGE.

**SECTION 29.** *And be it further enacted,* That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the

hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all the creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt. No discharge shall be granted, or, if granted, be valid, if the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy in relation to any material fact concerning his estate or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writings relating thereto, or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof; or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution; or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has re-

moved or caused to be removed any part of his property from the district, with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate; or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account; or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act; and before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

SECTION 30. *And be it further enacted,* That no person who shall have been discharged under this act, and shall afterward become bankrupt, on his own application shall



was filed by (or against) him; excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy. Given under my hand, and the seal of the Court, at \_\_\_\_\_, in the said district, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_.

(Seal.)

\_\_\_\_\_, Judge.

SECTION 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge.

SECTION 34. *And be it further enacted*, That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in *hæc verba*, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge: *always provided*, that any



creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts, and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

The policy of the Bankrupt Law comprehends two great objects: the distribution of the debtor's effects in the most expeditious, equal, and economical mode, and the liberation of his person from the demands of his creditors after he has made a full surrender of his property. The effect of the order of Discharge is to exempt the bankrupt from the payment of all debts which might have been proved

under his bankruptcy, and, as it has been before observed, whether the bankrupt be released from a debt, and whether it be provable under his bankruptcy, are strictly convertible terms.

The section enacts certain penalties against bankrupts by invalidating the Discharge; if the bankrupt has been guilty of the following misconduct, no Discharge shall be granted, and if granted, be valid:

*If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy in relation to any material fact concerning his estate, or his debts, or to any other material fact.*

This provision may be found in the Insolvent Acts of some of the States; it did not exist in the United States Bankrupt Act of 1841, nor is it in any of the various English Bankrupt Acts. The author can not find that it has received any judicial construction.

The falsehood must be willful, and committed in relation to some material fact with reference to the bankrupt's estate, or his debts, or any other material fact to which he has deposed on oath during the proceedings in the bankruptcy. The question in fact involves a trial by the court of a charge of perjury; and the consequences to the bankrupt being highly penal, the principles which regulate the evidence upon an indictment for perjury will probably be adhered to.

To substantiate the offense, it must be proved that the false oath was willfully taken. If taken from inadvertence or mistake, it will not amount to voluntary and corrupt perjury. An oath is held to be willful when taken with deliberation, and not through surprise or inadvertency, or a mistake of the true state of the question. — *Com. vs. Cornish*, 6 Binney, 349. Vide also *Steiman vs. M'Williams*, 6 Barr., 178.

A bankrupt who submits the facts in regard to his property fairly to the advice of his counsel, and, acting under the advice thus given, withholds certain items from his schedule, is not guilty of perjury, the fraudulent intent being wanting. — *U. S. vs. Conner*, 3 M'Lean, 573. But if he makes false statements in regard to it, in answer to interrogatories proposed to him in his examination, it is perjury. — *U. S. vs. Dickey*, 1 Morris, 412.

False swearing to a fact, to the best of the opinion of the witness, which the witness, though without any reasonable cause, believes to be true, is not perjury. — *Com. vs. Brady*, 5 Gray, Mass., 78.

It must also be proved to have been committed in a matter material to some of the proceedings. It may be committed in swearing falsely to a collateral matter with intent to prop the testimony on some other point, but such collateral matter must be material to the question in dispute; if it be a point the existence or non-existence of which can not affect the question in dispute, it does not tend to prevent the due administration of justice, and, therefore, is not perjury. — *Studdard vs. Linville*, 3 Hawks, 474.

An intentional omission by one applying for the benefit of the

Bankrupt Law, to place any portion of his property upon a schedule sworn to by him as containing a true account of all his effects, was held to be perjury.—U. S. vs. Nichols, 4 M'Lean, 23.

Upon an indictment against the defendant for a misdemeanor in falsely swearing that he *bona fide* had such an estate in law or equity of the annual value of £300 as qualified him to be a member of Parliament for a borough, a surveyor stated that the fair annual value of the property was about £200 a year; but another witness stated that it was badly let, and believed that it was worth more than £300 a year, and that he told the defendant so, and that he did not think that the defendant had any reason to believe that the qualification in point of value was not sufficient. It was held, that the jury must be satisfied beyond all doubt that the property was not of the value of £300 a year, and that at the time the defendant made the statement, he knew that it was not of that value.—R. vs. De Beauvoir, 7 C. & P., 17.

Superfluous and immaterial matter stated in a deposition or examination, and by analogy, in a bankrupt's petition or schedule, although false, would not amount to perjury.—White vs. State, 1 Sm. & Marsh, 149.

*If he has concealed any part of his estate, or his effects, or any books or writings relating thereto.*

The fraud or concealment of property by the bankrupt must be deliberate and intentional to affect him. The removal of property from the bankrupt's house or place of business, and delivery to some person or persons in trust for him, and omitting the same from his petition, or schedule, of property, and not accounting for the same to the assignee, would be cogent evidence of an intention to conceal his estate and effects. The same also with respect to his books.

*If he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act.*

This provision was not in the United States Bankrupt Act of 1841, nor is there any such in the English Bankrupt Acts. Any fraud in the delivery by the bankrupt of his property to the assignee is analogous to concealment of property, which has been alluded to in the preceding note. The question of what will amount to negligence on the part of the bankrupt in the care and custody of his property at the time he presents his petition, and until he delivers it to the assignee, is of wider import.

From the moment of filing his petition the bankrupt will be considered as a trustee for the assignee and the creditors of such property as may be in his possession or control, and the strictest diligence in the care of such property will very properly be exacted of him. In the case of an ordinary bailee, diligence in the custody of the article deposited with him is required by the principles of the common law. Gross negligence in the care of property, it has often been said, is equivalent to fraud, and is evidence of fraud.

It may in certain cases afford a presumption of fraud, and in very gross cases approach so near as to be almost undistinguishable from it, especially when the facts seem hardly consistent with any honest intention. *Magna negligentia culpa est*, was a principle of the civil law. If the bankrupt should neglect the custody of his property, or should expose it to unnecessary jeopardy, and it should be injured or lost through such negligence, he would clearly be liable to have his certificate opposed, or, if obtained, invalidated; but all such questions will be decided by their own special circumstances. In every case he will be required to take such reasonable care of the property as he would of his own; and what amounts to such reasonable care must depend upon the nature, value, and quality of the property, and the circumstances under which such property may be placed.

*If he has caused, permitted, or suffered any loss, waste, or destruction thereof.*

*If within four months before the commencement of such proceedings he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution.*

This is also made an act of bankruptcy upon which the debtor can be compulsorily made bankrupt, and is treated of in the notes to Section 40.

Next follow a series of misconduct or offenses which, to affect the bankrupt's order of Discharge, must have been committed by him *since the passage* of the act. The act is to commence and take effect, as to the appointment of the officers created thereby, and the promulgation of rules and general orders, from and after the date of its approval, which approval was given by the President on March 2, 1867. But no petition or other proceeding under the act is to be filed, received, or commenced before the 1st day of June, 1867. It may therefore be considered that the act, though passed on the 2d of March, 1867, is limited in its operation to the appointment of the officers, and the promulgation of rules and general orders, and that its passage, with reference to the commencement of proceedings in bankruptcy, will date from the 1st of June, 1867. Some doubt, however, may be raised upon this point, one of much importance with reference to the penal consequences attaching to the conduct of debtors, who may themselves petition or be compulsorily made bankrupt. Vide Section 50.

*If since the passage of the act he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account, or other document, with intent to defraud his creditors.*

An analogous provision exists in the English Bankrupt Act, 24 & 25 Vict., chap. 134, § 221, except that the offense must have been committed by the bankrupt within three months next before the adjudication in bankruptcy.

There is no limit in the section of that nature as to the time within which, previous to the commencement of the proceedings in

bankruptcy, the falsification of the books and the fraudulent entries must have taken place. The gist of the offense in this and like cases, depends upon the intention with which it has been committed; and if that be made apparent, and the court be satisfied that such intention was to defraud the creditors, the order of Discharge will be disallowed.

*If he has removed or caused to be removed any part of his property from the district with intent to defraud his creditors.*

This substantially is made an act of bankruptcy. Vide notes to Section 39, "Acts of Bankruptcy."

*If he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property.*

As to what amount to "fraudulent preferences," and "fraudulent payments, gifts, transfers, and assignments," vide notes to Section 35.

*If he has lost any part of his property in gaming.*

This provision has probably been adopted from the earlier English Bankrupt Laws, by which the certificate of the bankrupt, which was analogous to the order of Discharge, was rendered invalid if the bankrupt at any time before his bankruptcy had lost the sum of ten pounds sterling by gaming or wager. In practice it operated very harshly; in many instances a bankrupt had given up the whole of his property to his creditors, and had acted honestly in every respect, when some person came forward and impeached his certificate upon the ground that he had lost a wager or bet to the amount which the statutes prohibited. There is no such provision in the recent English act consolidating the law of bankruptcy, nor was there any such in the United States Bankrupt Act of 1841.

The word gaming has a large signification: it includes wagers, bets, or stakes made to depend upon any chance, casualty, or unknown or contingent event whatever, and is strictly prohibited by the statutes of the various States.

Gaming, therefore, is not confined to playing at a common gambling-house, but includes betting and wagering.

For the penalties against gaming, betting, and wagering in the different States, and the construction of the laws of each State upon this subject, vide United States Digest, title *Gaming*.

The provision itself is somewhat loosely drawn. Is the loss of any part of the bankrupt's *property* to mean the same thing as the loss of *money*? Upon reference to the various statutes in each State prohibiting gaming and wagering, and enacting penalties, it will be found that they almost invariably specify the word *money* as well as *property*; for instance, the Revised Statutes of the State of New York, Art. 3, Sec. 9, enact, That any person who shall pay, deliver, or deposit any money, property, or thing in action, upon the event of any wager or bet therein prohibited, may recover the same of the winner or depository.

*If he has admitted a false or fictitious debt against his estate; or if, having knowledge that any person has proved a false or fictitious*

*debt, he has not disclosed the same to his assignee within one month after such knowledge.*

The former Bankrupt Act of 1841 contains substantially the same provision.

In order to impeach the order of Discharge, it would be incumbent upon the opposing party to establish that in fact no debt, nor semblance of a debt, existed, and that the proof is a fraud in its legal acceptation, and was made by the fictitious creditor in concert with the bankrupt for the purpose of defrauding the creditors.

The experience of the bankruptcy system in England proves the expedience and necessity of such a provision. It has frequently occurred that a bankrupt has given promissory notes and bills of exchange, and concocted fictitious invoices, for the purpose of accumulating proofs upon his estate, in some instances to add to the number and value of his creditors, to secure the choice of friendly assignees, or in order that the fictitious creditor, after proof of his debt, should receive a share of the dividend; and many prosecutions have been instituted for conspiracy to accomplish these objects, and the bankrupt and the parties concerned with him have been convicted.

In this, as in similar cases, the court will look at the intention of the party proving; a claim, for instance, may be admitted to proof where in fact no legal debt actually exists at the time, as in the case of a party who is surety for the bankrupt for a debt which he has not paid, and in respect of which an application may be made to expunge it from the proceedings, or to restrain the receipt of any dividend; or a debt may be expunged, not being supported by good and valuable consideration; but in all such instances, as has been before observed, the intent of the bankrupt to defraud the estate, by remaining passive with a knowledge of the transaction, constitutes the offense.

*If, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account.*

The Bankrupt Act of the United States of 1841 contains substantially the same provision. Until recently there was no obligation imposed by any Bankrupt Law in England upon a trader to keep proper books of account; but where he had omitted to do so, his examination under the bankruptcy was invariably opposed; and inasmuch as no bankrupt can there obtain his order of Discharge until he has passed what is termed his last examination, he became thus practically liable for the omission to keep proper books of account. The recent English statute consolidating the law of bankruptcy enacts, that if any bankrupt trader, with intent to conceal the true state of his affairs, has willfully omitted to keep proper books of account, the order of Discharge may be refused by the court, or it may be suspended, or the bankrupt may be sentenced to be imprisoned for any period of time not exceeding one year. The books of a bankrupt or insolvent trader in all commercial countries are always considered of great importance. The French Code, and the author believes the Prussian and Italian Codes, inflict severe penalties in respect of the omission.

One of the English Insolvent Acts now in force subjects the insolvent to imprisonment for a term not exceeding three years.

To justify the court in refusing or invalidating the bankrupt's order of Discharge, it should appear that the bankrupt's intention was manifestly to deceive and defraud his creditors. The definition of the offense in the English statute before alluded to, viz., *the intent to conceal the true state of his affairs*, might, perhaps, be one of the rules by which the court, in judging of the circumstances, would be guided. The section uses the words proper books of account, which probably will be construed as meaning the usual and ordinary books with respect to the particular trade and business of the bankrupt trader. Books carelessly or unskillfully kept, or entries inaccurately made, would scarcely justify the refusal or annulling of the order of Discharge. It will be observed that this provision applies only, by the terms used in the section, *to a merchant or tradesman*, the latter word being somewhat inaccurately used instead of the word *trader*. Vide Section 39; and as to what constitutes a "trader," vide notes, title "Acts of Bankruptcy."

*If he, or any person on his behalf, has procured the assent of any creditor to his Discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation.*

Any corrupt dealing on the part of the bankrupt with any creditor, in order to induce him to vote in the choice of assignees; to refrain from opposing his Discharge; or, having entered an opposition, to forbear from proceeding with it, violates the policy of the Bankrupt Law, and by this provision renders the bankrupt liable to have his order of Discharge refused or annulled; and every contract made by the bankrupt with a creditor for such an object is made void by the act. Vide Section 35 and notes.

*If he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is, or may be, under liability for him, or for the purpose of preventing the property coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts.*

For explanation of this provision, vide notes, title "Fraudulent Preferences;" Section 35 and notes, title "Acts of Bankruptcy;" Section 39.

*If he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act.*

Such are the grounds which will justify the court in refusing a bankrupt his order of Discharge, and, upon proof of any of which, the Discharge of any bankrupt, after it has been granted by the court, can be invalidated.

**Application by the Bankrupt for his Discharge.**—If no debts have been proved under the estate, or if no assets have come to the hands

of the assignee after the expiration of *sixty days* from the adjudication of bankruptcy, and *within one year* from such adjudication, the bankrupt may apply to the court for a Discharge from his debts. If debts have been proved against the bankrupt, or if assets have come to the hands of the assignee, the bankrupt can not apply for his Discharge until after the expiration of *six months* from the adjudication of bankruptcy. The section gives the right to the bankrupt to make the application in the one case after the expiration of sixty days, and in the other after the expiration of six months from the adjudication; but in either case the application should be made *within one year*. Should the bankrupt be unable, from circumstances, to make his application within the year, he should apply for leave to extend the period for hearing his application. In the English bankruptcy courts, the application is made in the form of a short petition, and regulated by the general rules and orders.

**Notice of the Application.**—Upon the application of the bankrupt for his Discharge, the court will order notice to be given by mail to all creditors who have proved their debts, and by publication in certain newspapers, to be designated by the court, to appear on the day appointed for that purpose, and show cause why the Discharge should not be granted to the bankrupt. The form of the notice, etc., will be prescribed by the general rules and orders.

**Oath to be taken by the Bankrupt.**—The precise time for taking the oath is not prescribed by the section; but at some time before the Discharge is granted, the bankrupt is to take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in the act as a ground for withholding such Discharge, or as invalidating such Discharge if granted.

**Opposing the Order of Discharge.**—The bankrupt having applied to the court for his order of Discharge, the creditor having notice, may appear on the day appointed for the purpose and show cause why it should not be granted. The grounds upon which such opposition may be based are treated of in the earlier portion of the notes. Section 31 provides that the opposing creditor *may* file a specification in writing of the grounds of his opposition. Although the word "may" is used in the section, the court, in justice to the bankrupt, would require a succinct and precise statement of the grounds upon which the creditor impeaches the conduct of the bankrupt.

Where a creditor, under the provision of Section 34, contests the validity of the order of Discharge within two years after its date, on the ground that it was fraudulently granted, he *must*, in that case, specify in writing which in particular of the several acts mentioned in Section 29 he intends to give evidence of against the bankrupt, and *must* set forth the grounds of such avoidance as to any other of the said acts, subject, however, to amendment at the discretion of the court. In the case of opposition by a creditor to the granting of a bankrupt's Discharge in the first instance, the terms of the section upon this point are not thus imperative. The former Bankrupt Act of 1841 gave the right to the bankrupt, in the event of opposition to his certificate and refusal of his Discharge by the



court, to demand a trial by jury upon proper issues directed by the court; and he also had the alternative of appealing from the decision of the court to the Circuit Court, which appeal might be heard and determined by the court summarily, or by a jury, at the option of the bankrupt.

The recent English act consolidating the law of bankruptcy, gives the right to a bankrupt to require a jury to be summoned to try the charges preferred by the opposing creditor against him, and also gives a right of appeal to the bankrupt, against the decision refusing his order of Discharge, to the lord chancellor.

This act gives no right of appeal to the bankrupt upon the refusal of his Discharge, nor to any creditor opposing it, if granted; nor is there any peremptory right, either to the bankrupt or to the opposing creditor, to demand a trial by jury. The section provides, that the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the District Court. The author suggests that a question may arise upon the construction of these words, whether the question of fact is to be tried by a jury at a stated session of the court, or by the court itself? The bill as passed, in the first instance, by the House of Representatives, gave the opposing creditor the right to demand a trial by a jury of the question of the bankrupt's right to a Discharge, and that such trial should take place at a stated session of the District Court.

The provision now in the act was an amendment inserted by the Judiciary Committee of the Senate; and it appears to the author probable that the words *by a jury* have been unintentionally omitted. It will be observed that *the question of fact* is that which is to be tried, and it seems anomalous that the court, instead of trying such question at the time it is presented, should direct it to be tried before the same tribunal. A question of fact, as is well known in practice, is essentially one for a jury, and invariably directed by the court to be tried by that tribunal. The point, however, will probably arise very early in the operation of the act, and the suggestions of the author are made with a view to its consideration.

Assuming the proper construction of the terms used in the section to be, that Congress intended a trial by a jury of a question of fact, are the parties to be entitled to a second trial upon the ordinary grounds upon which new trials are granted? The bill as it passed the House of Representatives provided, that one trial only should be had, and that the verdict of the jury should be final so far as the proceedings in bankruptcy were concerned.

It is to be observed that notice of the bankrupt's application for his order of Discharge is to be given in the manner prescribed by the section *only* to all creditors *who have proved their debts*, while the 31st Section provides in substance that *any* creditor may file a specification, and oppose the bankrupt's order of Discharge. Upon this a question may arise, whether a creditor who has not proved his debt under the bankruptcy has a *locus standi* in court to be heard in opposition. In the English Courts of Bankruptcy the question has been frequently raised; and the practice prevails of

not allowing a creditor who, having had the opportunity of doing so, has not proved his debt, to be heard. The question, however, has been held to be one entirely of discretion on the part of the court, and no appeal is allowed in England against the exercise of such discretion. It is also to be observed in this connection, that under the provisions of Section 34, the creditors who may contest the validity of the order of Discharge after it has been granted, upon the grounds there set forth, must be creditors in respect of debts which *have been proved or are provable* under the estate of the bankrupt; and the United States Bankrupt Act of 1841 enacted that, in any case of bankruptcy, the majority in number and value of the creditors who should have *proved their debts* at the time of the hearing of the petition of the bankrupt for his Discharge, might file their written dissent to the allowance of the bankrupt's Discharge.

The District Court of the United States for the Southern District of New York decided, that creditors who had not come in and proved their debts under the bankruptcy, could not file objections, and contest the right of the bankrupt to his Discharge.—In the matter of King, 5 Law Reports, 320.

**Contesting the Validity of the Discharge when granted.**—At any time within two years after the date of the order of Discharge, any creditor whose debt has been *proved* under the bankrupt's estate, or *is provable*, may contest the validity of such Discharge on the ground that it was fraudulently obtained, and apply to the court which granted it to set aside and annul it. The application must be made by the creditor in writing, and must specify which in particular of the several acts mentioned in Section 29 it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance. No evidence is to be admitted as to any other of the said acts, but the said application is to be subject to amendment at the discretion of the court. Vide the various acts enumerated in the previous notes, title "Order of Discharge."

The court is to direct that such notice of the creditor's application as it may deem reasonable be given to the bankrupt, and order him to appear and answer the same within such time as to the court shall seem fit and proper. The accusation and charges against the bankrupt of the fraudulent acts, in respect of which the creditor seeks to invalidate the Discharge, should be prepared with great care and accuracy. They assume the form of an indictment against him, many of them being constituted misdemeanors under the penal provisions of the act. Vide Section 44.

In order to invalidate the Discharge, the court must be satisfied by evidence,

1. That the fraudulent acts, or any of them, alleged against the bankrupt by the creditor are true, and,
2. That the creditor contesting the validity of the Discharge had no knowledge of such fraudulent acts committed by the bankrupt until after the Discharge was granted.

These elements having been proved to the satisfaction of the

court, the bankrupt's order of Discharge is to be set aside and annulled. If the fraudulent acts alleged are either not proved by the creditor upon the hearing, or if the court find that they were known to the creditor before the granting of the Discharge, judgment is to be rendered in favor of the bankrupt, and the validity of the Discharge is not to be affected by the proceedings. This provision is adopted from the recent English act consolidating the law of bankruptcy, which enacts that the bankrupt's order of Discharge shall not be reviewed by the court, unless the court see that the Discharge was obtained upon false evidence, or by reason of the suppression of evidence. And it may be observed that the bankrupt is afforded the same right to apply for a rehearing, where his order of Discharge has been suspended or refused upon the ground that false evidence has been adduced against him, a right which is not afforded by this act.

There was no such provision in the United States Bankrupt Act of 1841.

**Impeaching the Order of Discharge by Replication when it is pleaded.**—The bankrupt has still another ordeal to pass through. If sued by a creditor for a debt due before the adjudication of bankruptcy, such creditor proceeds with his action, and does not prove under the bankrupt's estate, and the bankrupt having obtained his order of Discharge, pleads it in bar to such action, the creditor may, by way of replication to such plea, impeach such Discharge upon all or any of the grounds in respect of which this act invalidates it; and the question thus raised upon the pleadings is that which is to be tried by the jury.

The decisions under the Bankrupt Act of 1841 almost unanimously establish, that where a creditor or other person seeks to avoid the order of Discharge obtained by a bankrupt under his bankruptcy, distinct and specific allegations must be made of the particular misconduct of the bankrupt with reference to the Bankrupt Law, by which the order of Discharge is invalidated, and that such allegations should appear on the record by way of replication to the plea of Discharge.—*Flournoy vs. Newton*, 8 Geo., 306; *Tomkins vs. Bennett*, 3 Texas, 36; *Swan vs. Littlefield*, 4 Cush., 474.

Certain creditors of a bankrupt, who had proved their claims against him, opposed his Discharge, and an issue was framed and tried in the District Court of the United States, involving the question, whether the bankrupt had been guilty of any fraud or willful concealment of his property, or had preferred any of his creditors contrary to the provisions of the Bankrupt Act. The jury returned a verdict in the bankrupt's favor, and the court granted a Discharge and certificate. Afterward a creditor, who had not proved his debt under the bankruptcy, nor had appeared before the court to oppose the bankrupt's Discharge, brought an action against him, and he pleaded his Discharge in bar. Held, that the verdict was not conclusive against the plaintiff, and that he might impeach and avoid such Discharge by evidence that the bankrupt had preferred

one creditor to another contrary to the provisions of the act.—*Beekman vs. Wilson*, 9 Met., 434.

Where the precise question of fraud, upon which the creditor sought to impeach the bankrupt's Discharge, had been passed upon by the District Court, the adjudication upon that question had the operation of an estoppel; but where the attempt was to impeach the certificate for further and other instances of fraud, beyond what were passed upon by the District Court, the adjudication did not conclude the creditor, for the estoppel must be confined to such as the case shows were passed upon by the District Court.—*Downer vs. Rowell*, 25 Ver., 2 Deane, 336. It was held that a bankrupt's certificate of Discharge was not avoided by his having given money or property to a creditor, who had filed objections to his Discharge for cause assigned, in order to induce such creditor to withdraw his opposition.—*Chamberlin vs. Griggs*, 3 Denio, 9. Where a bankrupt has made conveyances to prefer creditors in contemplation of bankruptcy, in replying such matter to avoid the certificate of Discharge, it was held not to be necessary to set out the property conveyed, nor the names of the nominal parties to the conveyance; it is sufficient to state the names of those beneficially interested.—*Shelton vs. Pease*, 10 Mis., 473.

Where a plaintiff sought to invalidate a bankrupt's Discharge under the Bankrupt Law of 1841, upon the ground that the defendant in his petition in bankruptcy had omitted to insert his name, whereby he had no notice of such bankruptcy, and could neither prove his claim under the estate nor oppose the granting of the bankrupt's Discharge, it was held, that in order to avoid such Discharge by reason of such omission, it was incumbent on the plaintiff to show that the omission was willful and fraudulent.—*Burnside vs. Brigham*, 8 Met., 75. Where a defendant relied on a Discharge under the Bankrupt Act of 1841, and the plaintiff attempted to avoid such Discharge by showing that the bankrupt had concealed a portion of his property, the latter was allowed to give in evidence the statements made by him to his counsel, who assisted him in making an inventory of his property, respecting the property alleged to have been concealed, and the advice given by his counsel that such property ought not to be inserted in such inventory.—*Robinson vs. Wadsworth*, 8 Met., 67. Any one interested in the administration of the effects of the bankrupt may object to the Discharge, though not technically a creditor.—In the matter of *Book*, 3 M'Lean, 317.

In order to enable a plaintiff to impeach a Discharge in bankruptcy, pleaded on the ground of some fraud, or willful concealment by him of his property, the reasonable notice specifying in writing such fraud or concealment required by the Bankrupt Act should be, either by replication to the defendant's plea seasonably filed, or by written notice seasonably given, setting forth in each case the fraud and concealment, and wherein it consisted, as specifically as if it were a special declaration in an action on the case.—*Chadwick vs. Starrett*, 27 Maine, 14 Shep., 138.

The certificate, *i. e.*, the Discharge of a bankrupt, who had concealed part of his property with intent to defraud his creditors, was held void under the 38th Section of the English Bankrupt Act, although he voluntarily gave it up before the granting of the certificate.—*Courtivron v. Meunier*, 2 Eng. Law and Eq. Rep., 393.

A Discharge under the late Bankrupt Act of the United States, when pleaded in bar to an action for prior indebtedness, may be impeached and avoided on account of preferences given to creditors, and of payments and transfers of property in contemplation of bankruptcy, forbidden by the 2d Section of the act.—*Brereton vs. Hull*, 1 Denio, 75. For a replication to a plea of Discharge and evidence in support of such replication, *vide* cases, *Richards vs. Nixon*, 20 Penn., 8 Harris, 19; *Chambers vs. Neal*, 3 B. Mon., 25.

The bankrupt is entitled to notice of the intention of the creditor to impeach the validity of his Discharge for fraud, and to have the specific fraud which the creditor relies upon distinctly stated.—*Hubbell vs. Cramp*, 11 Paige, 310.

The omission by a petitioner under the act to give notice to a creditor is not of itself, without proof that the omission was fraudulent or intentional, sufficient to invalidate the petitioner's Discharge under the bankruptcy as against such creditor.—*Brown vs. Rebb*, 1 Richardson, 174.

A replication to a plea of Discharge under the Bankrupt Act must state what particular act of fraud the bankrupt defendant has committed; a mere general averment that he had made payments or transfers of property to creditors, in violation of the provisions of the Bankrupt Law, would seem to be insufficient; and for what such a replication should specifically allege, and its form, *vide* *Brereton vs. Hull*, 1 Denio, 75.

**Pleading the Discharge.**—In order to avoid the many conflicting decisions of the American courts upon the construction of the Bankrupt Act of 1841 with respect to the averments necessary to support the plea of the bankrupt's order of Discharge, and to be alleged in such plea, the 34th Section of this act adopts the form of plea prescribed by the English act consolidating the Bankruptcy Law, and provides that the Discharge may be pleaded by a simple averment that on the day of its date such Discharge was granted to him, setting the same forth *in hæc verba*.

The Discharge may be pleaded since the last continuance in bar of the suit, and in such plea it is not necessary to state when the plea is filed. The time of filing appears sufficiently from the filing, and the leave of the court to file it.—*Keene vs. Mould*, 16 Ohio, 12.

A plea of certificate of Discharge need not set forth the facts necessary to give jurisdiction to the court granting it, and all matters in avoidance of the certificate of Discharge must be specially replied.—*Rowan vs. Holcomb*, 16 Ohio, 463; *Suydam vs. Walker*, 16 Ohio, 122. The order of Discharge, after other pleas have been entered, should be pleaded as a plea since the last continuance.—*Corpening vs. Grinnell*, 10 Iredell, 15.

Where the defendant obtains his Discharge in bankruptcy after

an action has been brought, the plaintiff will be allowed to discontinue without costs, but not so if the Discharge has been obtained before action brought.—*Camp vs. Gifford*, 7 Hill, 169.

A plea of bankruptcy stating that, after the making of the promise sued on, the defendant became a bankrupt within the meaning of the statute of bankruptcy, but which sets out no Discharge under the law, is bad.—*Atkinson vs. Fortinberry*, 7 S. & M., 302; *Ingass vs. Savage*, 4 Barr, 224.

Where a defendant, after the commencement of an action against him, jointly, with others, obtains his Discharge in bankruptcy, but neglects to obtain leave to plead it, and suffers judgment to be entered against him, it seems that he can not set up his Discharge afterward in opposition to the appointment of a receiver in a creditor's suit founded on such judgment.—*Steward vs. Green*, 11 Paige, 535. As to the effect of the certificate of Discharge in answer to a creditor's bill, and the averments necessary in pleading such Discharge in a State Court, *vide* *Hubbell vs. Cramp*, 11 Paige, 310.

Where a decree is made by the Court of Chancery before the Discharge of the defendant in bankruptcy for the payment of a debt contracted before the bankruptcy, the Discharge is a bar to any suit or other proceeding upon the decree to charge the defendant personally with the debt.—*Johnson vs. Fitzhugh*, 3 Barb. Chan. Rep., 360.

A certificate of Discharge granted in the District Court of the United States in one State is not evidence in another, without the authentication of the certificate of the clerk by the judge.—*Dorsey vs. Maury*, 10 S. & M., 298.

Where a creditor's bill is filed before a decree of bankruptcy against the defendant, so as to obtain a lien upon his property, and the defendant subsequently obtains a Discharge in bankruptcy, he can not plead it generally in answer to such bill, it being only a personal Discharge, and not affecting the lien of the bill upon his estate.—*Lowry vs. Morrison*, 11 Paige, 327.

A Discharge in bankruptcy granted by a District Court of the United States under the Bankrupt Law of 1841, was a good defense to an action of covenant upon a warranty in a State Court, which was not broken until after a certificate of Discharge was granted.—*Bates vs. West*, 19 Ill., 134.

The Supreme Court will on motion, in their discretion, reverse a judgment of the County Court in order that the defendant may plead in bar his Discharge under the bankruptcy, such Discharge having been obtained subsequently to the final trial in the County Court, on payment by the defendant of costs in the Supreme Court.—*Bank of Bellows' Falls vs. Onion*, 16 Verm., 470.

**Omission to plead Discharge.**—Where a suit is pending against a bankrupt at the time he obtains his Discharge upon a debt provable in bankruptcy, and he does not plead his Discharge in bar as he might do, a Court of Equity will not annul the judgment rendered against him in order to give effect to his Discharge.—*Bellamy vs. Woodson*, 4 Geo., 175.

Where a defendant has neglected to plead his Discharge as a bankrupt, obtained after suit was commenced, and judgment has been given against him by default, he may be let in to plead on payment of costs. — *Lee vs. Philips*, 6 Hill, 246; *Sanford vs. Sinclair*, 6 Hill, 248.

**Amending Plea.** — Where there was a defective plea of a bankrupt's Discharge, the case being in the last resort, the defendant had leave to amend. — *M'Niel vs. Knott*, 11 Geo., 152.

**Effect of the Discharge upon foreign Debts.** — A Discharge under the Bankrupt Act of the United States does not Discharge a debtor from debts contracted, and made payable in, a foreign country, unless by express terms of the statute itself, or unless the foreign creditors should come in and prove their debts under the bankruptcy. — *Murray vs. De Rottenham*, 6 Johns. Ch., 52.

Where the acceptor of a bill at the time it was drawn and accepted, although a citizen of the United States, resided in England, and continued to reside there until after its maturity, and became bankrupt in England after the maturity of such bill, and obtained his Discharge under the Bankrupt Laws of that country, it was held, that his liability as such acceptor was thereby discharged, notwithstanding such bill, when it was accepted, was owned by a citizen and resident of the United States, and thence continued to be so owned until after such Discharge was obtained. — *Olyphant vs. Atwood*, 4 Bosw., N. Y., 459.

A Discharge under the English Bankrupt Law of a merchant residing in England, from a debt due to a citizen of Massachusetts, contracted and payable in England, is a bar to a subsequent action on the debt in that State, whether the debtor proved his debt under the English Bankrupt Law or not. — *May vs. Breed*, 2 Cush., 15.

The Discharge in bankruptcy did not Discharge the bankrupt from debts contracted and made payable in a foreign country, unless the foreign creditors come in and prove their debts under such bankruptcy. — *M'Menomy vs. Murray*, 3 John. R., 435.

A and B, copartners, conveyed lands to C in trust for security of certain of their European creditors until they should be paid or B should be exonerated, and after the said debt should be satisfied, or B so exonerated, then in trust for A. A and B were afterward discharged from their debts under the Bankrupt Act of the United States; held, that the deed of trust was valid, and that B's Discharge from the partnership debts was not a fulfillment of the condition on which the trust for the foreign creditors was created. — *M'Menomy vs. Murray*, 3 Johns. Ch., 435.

A certificate of Discharge under the Bankrupt Law of the United States of 1841 was held to Discharge the bankrupt from all suits brought here for debts, domestic or foreign, which were or might have been proved under the bankruptcy. — *Murray vs. De Rottenham*, 6 Johns. C. R., 52. The general rule is, that a Discharge from a contract according to the laws of the place where it is made, or where it is to be performed, is good every where, and extinguishes the contract. — *Very vs. M'Henry*, 29 Maine, 16 Shep., 206. And

upon the other hand, the Discharge of a contract by the law of the place where the contract was not made, or to be performed, will not be a Discharge. A debt created in London, England, and due to a London creditor, is not extinguished by a Discharge of the debtor under the Bankrupt Act of the United States.—*Lizardi vs. Cohen*, 3 Gill, 430.

**Upon Debts and Liabilities in General.**—The validity of a decree by the United States Court giving a Discharge in bankruptcy to a debtor under the act of 1841, can not be questioned if the certificate has not been impeached for fraud, and the debt in question is not of that fiduciary class which is saved from the operation of the act.—*Beach vs. Miller*, 15 La. An., 601.

A decree showing an absolute Discharge in bankruptcy, and that the bankrupt was authorized to receive a certificate, is conclusive as a plea in bar without the certificate itself.—*Viele vs. Blanchard*, 4 Greene, Iowa, 299.

**Debts not Barred or Extinguished by the Bankrupt's Discharge.**—In order to ascertain which debts are extinguished by the bankrupt's Discharge, the real test is what debts are provable under the bankruptcy. The following cases decide what character of liabilities are not extinguished by the Discharge.

**Covenant of the Bankrupt to pay Annuity.**—By a deed of separation between the defendant and his wife, the defendant covenanted with the plaintiff, as trustee for the wife, to pay him, for her separate use, an annuity, to commence from the 11th of January, 1854. On the 29th of September, 1854, and while the defendant and his wife were living separate, the defendant became bankrupt. Held, that the annual sum so covenanted to be paid was not a debt payable on a contingency, nor a liability to pay money on a contingency, and, consequently, that the bankrupt's certificate was no bar to an action for the recovery of a quarterly payment which became due after the bankruptcy.—*Parker vs. Ince*, 4 Hurl. & Nor., 53.

A demand arising upon an undertaking which creates a liability to pay money at several different periods, if several contingencies shall happen at those several periods, is not a demand provable under the bankruptcy, and is therefore not barred by the certificate.—*Warburg vs. Tucker*, 32 Eng. Law and Eq., 189; 4 Jurist, N. S., 1142. In this case, which was considered in England a leading case upon the subject, the defendant, being indebted to the plaintiff, had assigned to him by way of security a policy of insurance upon his life, and had covenanted to pay all future premiums; and secondly, that, if he did not pay them, it should be lawful for the plaintiff to pay the premiums, and that he (the defendant) would repay him. The plaintiff sued the defendant upon this covenant, assigning as breaches, first, that the defendant had not paid the premiums; and, secondly, that he had not repaid to the plaintiff the premiums which had been paid by him on the defendant's default. The defendant pleaded his certificate under the bankruptcy in bar of the action; and it was held by the judges (in error), affirming the decision of the Court of Queen's Bench, that such certificate was no bar to an



action to recover the premiums which accrued due, and were so paid by the plaintiff after the bankruptcy. The effect of this decision was to render the bankrupt liable for all future premiums upon policies of insurance which before his bankruptcy he may have covenanted to pay; and that being the state of the law in England as the result of the decision in the case cited, and to remedy the hardship and injustice upon a bankrupt, the author inserted in the last English Bankrupt Act a clause to remedy that injustice. Vide 24 & 25 Vict., chap. 134, § 154. The same clause was suggested to the promoters of this bill, but has not been adopted; and the decision, therefore, will be applicable to the bankrupt's liability upon such covenants, notwithstanding his Discharge. See also the case of *Young vs. Winter*, 32 Eng. Law and Eq. Rep., 437.

**Contingent Debt.**—Bankruptcy during the currency of the quarter, and a subsequent certificate of the bankrupt, is no bar to an action by a schoolmaster for board and tuition of a bankrupt's son under a quarterly contract, the demand not being a debt "not payable at the time of the bankruptcy" within the meaning of the English Bankrupt Act, nor "a liability to pay money on a contingency."—*Hopkins v. Thomas*, 7 C. B., N. S., 711.

Where it appears on the face of a bond to secure an annuity, that one of the joint and several obligors is, in fact, a surety only for the other, he is to be looked upon as a surety, and not as a principal, in all questions under the Bankrupt Laws; consequently, his bankruptcy and certificate will not discharge him from liability to pay arrears of an annuity accruing due since his bankruptcy, and unpaid by the principal.—*White vs. Corbett*, 11 Ellis, B. & E., 1103.

**Contracts to pay Accruing Taxes.**—A debtor conveyed his property in trust for his creditors, and covenanted to pay the taxes on the property; it was held that a discharge under the Bankrupt Law of 1800 did not discharge this collateral covenant as to taxes accruing subsequently to the Discharge.—*Murray vs. De Rottenham*, 66 John. Chan. Rep. 52.

Where a bankrupt had covenanted to pay all taxes, etc., that should be assessed on land which he had conveyed in trust, and to discharge certain specified encumbrances existing thereon, it was held, that he was liable after his Discharge on the covenant to pay the taxes laid from time to time upon the land which had been paid by the party to whom he had conveyed the land, they not being provable under the bankruptcy; but as to the encumbrances existing at the time of the bankruptcy, and which had been paid off by the same party, it was held that he was discharged.—6 Johns. Chan., 45.

**Liability on Guarantee.**—The bankrupt had given a continuing guarantee for goods to be supplied to B, with a stipulation that the security should subsist until notice in writing to the contrary. Goods were supplied on the faith of the guarantee, and a debt incurred. No notice had been given to determine the guarantee, and it was held, that the bankrupt's liability thereon was a contingent liability within the meaning of the English Bankrupt Act, and con-

sequently that the debt was provable, and that the certificate was a bar in respect to all goods supplied to B after the bankruptcy.—*Boyd vs. Robins*, 4 C. B., N. S., 749. This decision was afterward reversed in the Exchequer Chamber. Vide S. C., 577.

**Rent.**—If a house be taken for a year before adjudication of bankruptcy, and the bankrupt continue in possession afterward, he is not discharged from the subsequent rent by the Discharge under his bankruptcy.—*Hendricks vs. Judah*, 2 Caines, 25.

A Discharge in bankruptcy taking effect on the 28th of June, 1842, is not a bar to the recovery of a quarter's rent falling due on the 9th of July following, the bankrupt having occupied the premises until the end of the quarter.—*Savory vs. Stocking*, 4 Cush., 607.

A ground-rent in Pennsylvania coming due after the discharge of the debtor as a bankrupt, is not extinguished by his certificate.—*Bosler vs. Kuhm*, 8 Watts & Serg., 183.

A debtor was arrested on *mesne process*, and gave a bond in common form to procure his release from arrest. The surety in the bond then filed his petition, and was decreed to be a bankrupt under the late Bankrupt Act of the United States. Judgment having been obtained in the action, the bond became forfeited by the neglect of the principal to perform the condition thereof. The bankrupt afterward received his certificate of Discharge, and it was held that such certificate was no defense to a suit upon the bond.—*Woodward vs. Herbert*, 11 Shep., 358.

**Breach of Warranty.**—Where the breach of a warranty made prior to the bankruptcy is subsequent to the Discharge under the bankruptcy, such Discharge is no bar.—*Bush vs. Cooper's administrator*, 18 How., U. S., 82.

**Bankrupt's Liability for Calls or Shares.**—The defendant, being a holder of shares in a railway company, became bankrupt, and was sued for calls made in respect of such shares after his bankruptcy. It was held, that this debt was not barred by his certificate, as it was not provable under his bankruptcy as a debt due *in futuro*, nor as a debt due on a contingency within the meaning of the English Bankrupt Acts.—*South Staffordshire Railway Company vs. Burnside*, 2 Eng. Law and Eq. Rep., 418.

**Property held by the Bankrupt as Executor.**—The Discharge is no bar to the recovery of specific property held by the bankrupt as executor; but where he has received money which he ought to have distributed before his bankruptcy, and the distributees seek to recover it, it has been held that his Discharge is a bar.—*Waller vs. Edwards*, 6 Litt., 348.

An action on the case for deceit is not barred by a certificate of Discharge as a bankrupt, though the measure of damages be ascertainable by reference to a contract.

**Upon Judgments recovered after Adjudication.**—A certificate of Discharge under the act is a bar to an action upon a judgment recovered pending the proceedings in bankruptcy and before the granting of the certificate upon a debt due at the time of the decree in bankruptcy; and the costs accruing upon the debt after the

decree and before the granting of the certificate follow the debt in this respect.—*Harrington vs. M'Naughton*, 20 Vt., 5 Washb., 293. The question in all these cases is, whether the debt against the bankrupt actually existed at the time of the adjudication of bankruptcy; if it did it is provable under the bankruptcy of the debtor, and, if provable, the discharge under the bankruptcy releases the debtor from it. Vide the cases *Boyd vs. Vanderkemp*, 1 Barb., Chan. Rep., 273, 347. If a creditor to whom a debt is due at the time of the adjudication of bankruptcy has commenced an action against such debtor, and, instead of electing to prove his debt under the bankruptcy, continues such action to final judgment, the Discharge operates as a release; the enforcement of the debt by final process makes no difference.

Under the Bankrupt Law of 1841 the certificate of Discharge applied to debts owing before, though judgments be obtained on them after the bankrupt filed his petition. The judgment is not a new debt, but a new security, given by the act of the law for the same debt.—*Dick vs. Powell*, 2 Swan, Tenn., 632.

A judgment rendered after the defendant has presented his petition to be declared a bankrupt is not affected by his Discharge subsequently obtained under the bankruptcy.—*Kellogg vs. Schyler*, 2 Denio, 73.

A Discharge in bankruptcy, valid as regards the debt on which a judgment is founded, is operative against the judgment.—*M'Donah vs. Ingraham*, 3 Miss., 1 George, 389.

A judgment recovered after a party applied to be declared bankrupt was not barred by a decree of bankruptcy.—*Uran vs. Pondlette*, 36 Maine, 1 Heath, 15.

It was afterward settled in Vermont that the certificate of a bankrupt under the law of 1841 was a bar to an action upon a judgment recovered pending the proceedings in bankruptcy, and before the granting of the certificate, upon a debt due at the time of the decree in bankruptcy.—*Downer vs. Rowell*, 26 Vt., 3 Deane, 397.

**Non-payment by the Bankrupt of a Fine.**—A fine imposed upon a party by the Court of Chancery for the willful violation of an injunction order is not affected by his discharge under the Bankrupt Law.—*Spaulding vs. The People*, 7 Hill, 301. And it is presumed that the same rule would apply to any fine or pecuniary imposition by a State Court for contempt or violation of any of its orders.

Where a party has been committed for non-payment of a fine imposed as a punishment for a willful contempt, as for violating an injunction, or other criminal act of a like nature, he could not be discharged under the act. But an ordinary precept issued from the Court of Chancery committing a party for non-payment of a sum of money found due from him is a mere debt, and the debtor might set up his Discharge under the bankruptcy.—*People vs. Spaulding*, 10 Paige, C. R., 284.

**Liability to Sureties who have paid for the Bankrupt Principal.**—A Discharge under the Bankrupt Law of 1841 released the bank-

rupt from all future liabilities to his sureties for debts paid by them, not payable until after the Discharge took place. And he is released from liability to guarantors also under similar circumstances.—Fullwood vs. Bushfield, 14 Penn. State Rep., 2 Harris, 90.

Where the surety upon a note pays the same after the maker's Discharge in bankruptcy, although the note became due before such Discharge, he is not entitled to recover the amount from the bankrupt.—Mace vs. Wells, 7 How., U. S., 272.

The sureties of a defalcating public officer were not excluded from the benefit of the United States Bankrupt Act of 1841; but the Discharge of a bankrupt under such act does not affect his liabilities to such sureties.—Saunders vs. Commonwealth, 10 Gratt., Va., 494.

A man committed to prison on *meane process*, where he remains sixty days, was in the mean time fixed as bail; after the sixty days had expired he was adjudicated bankrupt. Held, that the demand on his recognizance of bail was provable under the bankruptcy, and therefore that his certificate discharged him from liability on that recognizance.—Rathbone vs. Blackford, 1 Caines, 588. See Payson vs. Payson, 1 Mass., 283.

One of two joint debtors who assumes the whole debt and indemnifies the other becomes thereby a surety, Sandf. Ch., 210; 10 Paige, 595; and being surety, and, as such, *liable* to pay the debt, he may come in and prove the claim under the act. The fact that the debt was not due at the time of the proceedings does not prevent this. The surety's claim, therefore, for payments made after the Discharge, is barred by the Discharge.—Ct. of Appeals, 1851, Crafts vs. Mott, 4 N. Y.; 4 Comst., 604; affirming S. C. 5 Barb., 305; S. P. Chancery, 1846, Morse vs. Hovey, 1 Barb. Ch., 404; affirming S. C. 1 Sandf. Ch., 188.

A decree for damages which are unliquidated, containing a provision for their liquidation by reference to a master, is a present debt, payable when the amount is ascertained by the master, and is therefore provable under the act of 1841.—Chancery, 1846, Boyd vs. Vanderkemp, 1 Barb. Ch., 273.

It was held under the Bankrupt Act of 1841, that where the plaintiffs had proved their debt under the bankruptcy, although they afterward defeated the application of the bankrupt for his Discharge, they were nevertheless precluded from maintaining any suit for their debt, and that they were not at liberty to prove their debt conditionally. The chancellor upon appeal decided that the intent of the statute was not that the proving of debts by the creditors should be an absolute abandonment of all claim against future acquisitions in case the Discharge should be refused, or if it should be void, but only that the proof of debts should be a waiver of any suits or proceedings inconsistent with the election to obtain satisfaction under the decree, and a consent to be bound by the Discharge, if the bankrupt should obtain one, which was not impeachable; and it was further decided in the same case that all proceedings theretofore commenced by the creditor are absolutely relin-

quished by the act of proving, and not merely suspended.—*Haxtun vs. Corse*, 2 Barb. Chan., 506.

A payment by a debtor, when it consists of an appropriation of a part only of his property, must, in order to bar his Discharge as a bankrupt, be made in contemplation of bankruptcy, and be voluntary. To show the payment to be in contemplation of bankruptcy, something more must appear than mere insolvency; and to be voluntary, the payment must originate with the debtor, the first step being taken by him, and not by the creditor.—*In re Rowell*, 21 Vt., 6 Washb., 620.

**New Promise by the Bankrupt to pay Debts extinguished by his Discharge.**—In order to make the Discharge of a bankrupt under his bankruptcy complete, and to secure to him the benefit of his exemption from all previous debts, the English Bankrupt Act prevents any creditor enforcing any contract, promise, or agreement made by the bankrupt after the commencement of the bankruptcy to pay any debt, claim, or demand, or any part of such debt, claim, or demand, from which he shall have been discharged by his certificate. This provision does not render the contract illegal, but the bankrupt may plead the statutory defense. In the American courts a new promise by the bankrupt to pay a debt, barred by his Discharge under the bankruptcy, is legal, and may be enforced; and some of the leading decisions upon this subject with reference to the act of 1841 are collected. It will be observed, that there is much conflict of authority as to the evidence sufficient to establish the fact of a new promise, and the facts upon which an action to enforce such promise is maintainable.

Although such decisions are in conflict as to the facts from which a new promise is to be inferred, and the evidence necessary to establish such promise, they appear to agree upon this point, namely, that such promise must have been made by the bankrupt at some period *before* he has obtained his Discharge under his bankruptcy, and that a promise made after such Discharge can not be supported in law—the Discharge being deemed to be a total extinguishment of the debt. Vide *Otis vs. Gazlim*, 31 Maine, 1 Red., 567; vide also *Petten vs. Ellingwood*, 32 Maine, 2 Red., 163.

Nothing less than an express promise to pay a debt discharged under the bankruptcy will revive the liability to pay it. Partial payments are not a new promise, nor the equivalent to a new promise.—*Stark vs. Stinson*, 3 Foster, N. H., 259.

Where a bankrupt, after the adjudication of bankruptcy, makes a new promise to pay in consideration of an agreement by the particular creditor not to prove under the bankruptcy, such promise is binding if there be no collusion prejudicial to other creditors. Vide case last cited. An express promise by a bankrupt after his Discharge to pay a prior debt, is a waiver of the Discharge, and, as the debt is sufficient consideration for such promise, he is bound by it. But if a condition be annexed to the promise, such condition must be complied with or fulfilled before the promise can be enforced.—*Yate vs. Hollinsworth*, 5 Har. & J., 216; *Maxim vs. Morse*,

8 Mass., 127. But a promise to pay a specialty debt, which has been discharged by a certificate of bankruptcy, does not revive the original debt, as a debt by specialty. The original debt is merely a consideration that gives validity to the new promise.—Field's Case, 2 Rawle, 351.

Where a new promise is made by a bankrupt to pay a debt contracted previous to his bankruptcy, such promise is valid, but does not revive his liability upon the note evidencing the debt, but renders him liable only on the new promise.—Carson vs. Osborn, 10 B. Mon., 155.

A new promise to pay a debt which otherwise would have been discharged by proceedings in bankruptcy made after the decree of bankruptcy and before the certificate of Discharge, is binding upon the party making it.—Corliss vs. Shepherd, 28 Maine, 15 Shep., 550.

A declaration of a discharged bankrupt that he was going to pay the particular debt as soon as he was able, and that he was going to pay all his honest debts except some in the city, though expressive of an intention, does not constitute an engagement to pay sufficient to avoid the legal effect of his Discharge.—Yoxtheimer vs. Keyser, 11 Penn. State Rep., 1 Jones, 364.

But a promise made by a bankrupt after he has obtained his Discharge does not revive the debt, for the Discharge in bankruptcy annihilates all previous debts of the bankrupt.

If a debtor previous to his bankruptcy promise a particular creditor to pay the debt when he shall be able, his Discharge is no bar to an action on the new promise, although the original debt might have been proved under the bankruptcy.—Kingston vs. Whorton, 2 S. & R., 208.

A creditor of a bankrupt, who has been discharged under his bankruptcy, can not maintain an action on a subsequent promise of the bankrupt "to pay when he is able" until all the assets of the bankrupt have been distributed.—Mason vs. Hughart, 9 B. Mon., 480. A new promise to overcome the effect of a bankrupt's Discharge must appear to have been made *after* the debtor was decreed to be a bankrupt; and a replication to a plea of a Discharge in bankruptcy, setting forth a promise made after the presentation of the petition, and before the commencement of the action, is bad.—Sebens vs. Sherman, Sandf. Sup. Ct. Rep., 510.

Great strictness was required, in order to create liability by a new promise made to pay a debt discharged under the bankruptcy, as much so as is necessary in the case of a new promise made to pay a debt barred by the Statute of Limitations. Vide Badger vs. Gilmore, 33 N. H., 361; La Tourette vs. Price, 28 Miss., 6 Cush., 702.

Where a creditor relies upon a new promise by the bankrupt to pay a debt discharged by his bankruptcy, the promise to pay such debt must be absolute and unconditional.—Brown vs. Collier, 8 Humph., 510.

As to what is sufficient evidence of a new promise, vide the cases, Spaulding v. Vincent, 24 Vt., 1 Deane, 501; Way vs. Sperry, 2 Cush., 238; Pratt vs. Russell, 7 Cush., 462; Herndon v. Givens,

16 Ala., 261. As to what evidence is necessary to bind the bankrupt by a new promise, vide also *Prewett vs. Carruthers*, 12 S. & M., 491; *Spooner vs. Russell*, 30 Maine, 17 Shep., 454; *Haines vs. Stanfer*, 13 Penn. State Rep., 1 Har., 541; *Evans vs. Carey*, 29 Ala., 99; *Taylor vs. Nixon*, 4 Sneed, Tenn., 352.

**Debts and Claims not Discharged.**—*No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under the act.*

The rules upon the subject as to what will constitute fraud in the contraction of a debt depends so much upon the peculiar circumstances of each case, and are frequently so complicated, that within the compass of this treatise it is impossible to do more than allude to some of the principles deducible from reported decisions.

It has been held, for instance, in the State of New York, that mere insolvency at the time known to and believed in by the party to the contract is not sufficient, nor mere concealment of the fact from the vendor. The proposition that a purchaser upon credit stands in a confidential relation to his creditor, so as to bind him to disclose his situation without any inquiry by the seller, is not sustained by sufficient authority. The test inquiry in such cases is, Did the party purchase the goods in question with the intention not to pay for them?—*Hall vs. Naylor*, 6 Duer, Rep., 71.

The rule thus laid down was substantially affirmed in the same case by the Court of Appeals. Judge Comstock says, "It does not appear that *Kerr & Co.*, in purchasing the goods in question, made any representation of their ability to pay for them. If, however, they concealed the fact of their insolvency with a design of procuring the goods without paying for them, it was a fraud which rendered the sale void. On the trial of such an issue, the *quo animo* of the transaction, is the fact to be arrived at. If, however, the purchaser, at the time of a new purchase, is not only insolvent, and knows himself to be so, but has performed an open and notorious act of insolvency by breaking up his business and assigning his property, it is his duty to communicate that fact, and the violation of that duty is a fraud."—*Mitchell vs. Warden*, 20 Barbour, 253.

But express representations of ability to pay, made at the time, and sufficient to induce, and which did induce the credit, will be evidence of an intended fraud. The representations must be false, and must be known to the party making them to be so.—*Freeman vs. Leland*, 2 Abbott, Rep., 479; *Wenzer vs. De Baum*, 1 E. D. Smith, 261; *Gaffney vs. Burton*, 12 Howard, Pr. Rep., 516.

It is competent to show that the party accused was engaged in other similar frauds at or about the same time. The transactions must be so connected in point of time, and so similar in their other relations, that the same motive may reasonably be imputed to them all.—Opinion of the Court of Appeals in *Hall vs. Naylor*; *Cary vs. Hotailing*, 1 Hill, 311, and cases.

Where the question is, whether goods have been procured by a fraudulent suppression of facts material to credit given, it will be

competent to prove that in other instances they have been obtained by actual misrepresentations concerning the same facts. The concealment in one case, and the false representations in the other, are evidence of a fraudulent design, common to both transactions, of procuring goods without the ability or intention to pay for them.

In the case of *Crandall vs. Bryan*, 5 Abbott, 162, some points of importance were determined; and although the case was before a single judge only, it seems that the propositions are either clearly law, or extremely well supported.

Fraudulent representations and deceit, accompanied by damage, constitute a good cause of action in respect to a sale of lands as much as in respect to personal property. They did so before the Code.—1 Comstock, 308.

As to what constitutes a debt contracted by the breach of a fiduciary relation, the most ordinary instances are those in which the bankrupt has been intrusted by his principal with goods or money in the capacity of agent, factor, broker, banker, attorney, or trustee. And the criterion in every such case is, whether the specific moneys received ought in good faith to have been paid over to the principal, or whether the bankrupt upon receiving such moneys had the right to use them as his own, holding himself accountable for the debt thus created. It must be clearly established that there was a special trust and confidence reposed in him. If the relation between the parties was merely that of creditor and debtor, it is not sufficient; the relation must be that of trustee and *cestui que trust*.

The words of this section are more comprehensive than those of the former Bankrupt Act of the United States of 1841, as to invalidating the order of Discharge; and for the purpose of applying the decisions under that act to a proper construction of the present act, it has been considered advisable to state them. The Bankrupt Law of 1841 excludes from its benefits "all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." And it followed from such provisions that the certificate of Discharge granted under that act did not release the bankrupt from any debts which came within that category.

It was decided by the former Bankrupt Act of 1841 that a factor who had sold the goods of his principal and received the money therefor, did not owe him a debt created while acting in a fiduciary capacity within the meaning of that act.—*Hayman vs. Pond*, 7 Met., 328; *Anstill vs. Crawford*, 7 Ala., 335; *Chapman vs. Forsyth*, 2 How., U. S., 202. Vide also *Williamson vs. Dickens*, 5 Iredell, 259.

The Circuit Court of the United States soon after decided that the existence of fiduciary debts would not prevent the bankrupt's Discharge from other debts; and that fiduciary debts, if proved, would be discharged. The creditor thereupon petitioned the District Court, before which he had proved his debt, to withdraw such proof. The court granted such petition, and thereupon gave the



bankrupt his certificate of Discharge, and it was held, that such fiduciary debt was not barred by the bankrupt's discharge.—*Morse vs. City of Lowell*, 7 Met., 152.

The principle upon which the above decisions proceed is, that if the creditor to whom a fiduciary debt is due from the bankrupt, elect to prove such debt, and receive a dividend under the estate, he is estopped from saying afterward that his debt is not within the law. If, however, he does not prove such debt, he may recover it from the bankrupt, notwithstanding the bankrupt's Discharge, by showing that it was a debt contracted by the breach of a fiduciary relation existing between the creditor and the bankrupt.

Where a person receives money or property belonging to another, as agent or bailee, to be paid over or delivered to the principal, or used in a particular way, or for specific purposes for his use, such property or money is held or received in a fiduciary capacity, the liability for which is not affected by the Discharge in bankruptcy of the agent or bailee.—*Matteson vs. Kellogg*, 15 Ill., 547.

A banker who had pledged a short bill of a customer was excluded from his certificate.—*Ex parte Strutt*, 17 Eng. Law & Eq. Rep., 515.

Where the usual course of dealing carried on by the bankrupt, who had traded without capital, had been to purchase goods, and immediately afterward to raise money by pledging them, and it appeared that this was done, not for a purpose merely dishonest, but in accordance with the custom in his trade, and with the *bona fide* expectation of being able afterward, on a rise in the market price of the goods, to redeem the goods and sell them at a profit, it was held, that this was not equivalent to the offense of contracting debts "by any manner of fraud, or by means of false pretenses," within the meaning of the 256th Section of the Bankrupt Law Consolidation Act of 1849.—*Ex parte Manico*, 17 Eng. Law & Eq., 594.

A private person who received a note or other security for collection was held, under the Bankrupt Act of 1841, to have received it in a fiduciary capacity, and that it was a case of special trust.—*White vs. Platt*, 5 Den., 269.

No debt created by the defalcation of the bankrupt as a public officer is to be discharged under the act, and it is assumed that such debt must have been created by the embezzlement or misapplication of moneys received by him in the course of his employment as such public officer. Vide *Peele vs. Elliott*, 16 How, Pr. R., 480, 481; *The Republic of Mexico vs. Arrangoiz*, 5 Duer, 604.

Under the Bankrupt Act of 1841, in some cases of this nature, the question arose as to the effect of a creditor whose debt had been created by the breach of a fiduciary relation between himself and the bankrupt, proving his debt under the bankrupt's estate, and it was decided, that where the creditor had elected to prove for such debt and take a dividend under the estate, he was barred like other creditors by the bankrupt's Discharge.—*Fisher vs. Currier*, 7 Met., 424.

Section 33, however, of this act provides in express terms that

such creditors may prove under the estate, and receive a dividend in payment of their debt; it is therefore presumed that the proof under the estate, and the receipt of a dividend, would not preclude or estop them from opposing or invalidating the bankrupt's Discharge.

**Discharge under a Second Bankruptcy.**—The act provides that no person who shall have been discharged under this act, and shall afterward become bankrupt *on his own application*, shall be again entitled to a Discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three fourths of his creditors who have proved their claims is filed at or before the time of such application for his Discharge.

If a bankrupt, therefore, upon a second bankruptcy occurring voluntarily and upon his own application, is unable to pay the required dividend under such bankruptcy, and is unable to obtain the requisite assent of his creditors, his order of Discharge under his second bankruptcy will be a nullity.

It is to be observed that the restriction applies as to the payment of the dividend to the debts *proved* under the estate, and not to those for which he may be liable, if not proved. The *onus* lies upon the bankrupt to establish that his former estate has paid seventy-five per centum, or can pay that amount to his creditors; it will not be sufficient to prove that his estate is likely to produce that amount. —Till vs. Wilson, Man. & Ry., 580; Edmondson vs. Parker, 3 B. & P., 185; Coverley vs. Morley, 16 East., 225; Jeffs vs. Ballard, 1 B. & P., 467. It will not fail to be remarked that this provision applies only to cases where the adjudication of the first bankruptcy has taken place under the voluntary clause of the act upon *the bankrupt's own application*, and in practice this may be defeated by the bankrupt procuring the adjudication in the second bankruptcy by a friendly creditor under the compulsory clause of the act.

In the event of a second bankruptcy, the order of Discharge under such bankruptcy will be valid upon the bankrupt proving to the satisfaction of the court that he has paid all the debts owing by him at the time of such previous bankruptcy, or that he has been voluntarily released by his creditors from such debts.

**Bankruptcy after one Year from the Date of this Act.**—It is expressly enacted in Section 33, that in all proceedings in bankruptcy commenced *after one year* from the time this act shall go in operation, no Discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of the application for the Discharge.

This provision is not limited to cases of voluntary bankruptcy, but is equally applicable to the bankruptcy of a debtor compulsorily made bankrupt.

## FRAUDULENT PREFERENCES AND CONVEYANCES.

SECTION 35. *And be it further enacted,* That if any person, being insolvent, or in contemplation of insolvency, within ~~four~~ months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; and if any person being insolvent, or in contemplation of insolvency or bankruptcy, within ~~six~~ months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provi-

sions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

The provisions of this section, one of the most important in the whole act, makes void certain transactions of the bankrupt, and certain assignments, transfers, conveyances, payments, and pledges, within four months and six months respectively before the filing of the petition for an adjudication in bankruptcy, either by himself or by a creditor against him; and it gives the assignees the right to recover the property, or the value, from the person who has obtained its possession, in order that such property, or its value, may be distributed generally among the creditors of the bankrupt's estate.

From the earliest existence of a Bankrupt Law the same provisions are found. In the first Bankrupt Act which was passed in the reign of James I., the bankrupt was prohibited from making, or causing to be made, any fraudulent conveyance of his lands, tenements, goods, or chattels; and under that head were classed all the cases of fraudulent conveyances—that is to say, voluntary conveyances without a valuable consideration—which were rendered void without the intervention of bankruptcy, as against creditors, by the well-known statutes passed in the previous reign, 13 Eliz., chap. 5, and 27 Eliz., chap. 4, the provisions of which are so well known to

every American jurist, and are incorporated in the Insolvent Acts of the various States of the Union.

Under these earlier statutes the English courts decided, that under the original Bankrupt Act of James I., all grants and conveyances were void as against the creditors of a bankrupt, which a Court of Equity would declare fraudulent, as well as all cases which either appear from the facts themselves to be, or from conclusion of law arising from these facts would be deemed to be, fraudulent as against third parties, however fair and binding they might be as between the parties themselves.

The first enactment of the section is :

*That if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, procures any part of his property to be attached, sequestered, or seized in execution ; secondly, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited ;*

*If any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property, to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as the assets of the bankrupt.*

The first two subdivisions of the section are intended to apply to, and to defeat and invalidate what are deemed to be fraudulent preferences to creditors.

The third subdivision of the section is intended to invalidate transactions calculated to defeat the policy of the Bankrupt Law, which contemplates the distribution of the bankrupt's estate equally among his creditors ; and the distinction must be remembered, that the actual fact of insolvency, or the act being done in contemplation of insolvency, and reasonable cause existing on the part of the creditor to believe that the bankrupt is at the time insolvent, are the requirements necessary to defeat any fraudulent preference.

It is not necessary that bankruptcy should have been contemplated, and this obvious distinction will be borne in mind in applying the principles of the legal decisions upon this branch of the Bankrupt Law. It may be laid down as a general principle that, in order to make a transaction void as a *fraudulent preference* under the act, it must not only be made at a time when the debtor was either insolvent, or contemplated insolvency, but it must also have been *voluntary*. If there be any threat or pressure on the part of the creditor, it will not be voluntary. The transaction must originate with the debtor, and be his own *voluntary* act.

Many of the American decisions under the Bankrupt Law of 1841, and the English decisions on the meaning of the words *contemplation of bankruptcy*, are very conflicting, and difficult to reconcile.

In referring to the authorities, American and English, those have been selected from which the principles which regulate these transactions will the most easily be deduced. Each case depends so much upon its own intrinsic facts that it is impossible to analyze them. Many conveyances and assignments which would be valid under many of the State laws are rendered void by the section, as calculated and intended to defeat the distribution of the debtor's estate under the Bankrupt Law. The transfer by a debtor of part of his property to a creditor in consideration of a pre-existing debt would be a valid assignment under the laws of many States; but if made voluntarily, and in *contemplation of bankruptcy*, it is defeated by the act, as being against the policy of the Bankrupt Law. Generally speaking, a debtor has a right to prefer one creditor to another; he may assign ~~all, or a~~ portion of his property, to such creditor, but if he does it *voluntarily*, and in *contemplation of bankruptcy*, he contravenes the policy of the Bankrupt Law.

It may be laid down as a general principle, that where any assignment or conveyance is fraudulent, as being in contravention of the policy of the Insolvent Laws of the various States, it is *a fortiori* void, as against the policy of the Bankrupt Law.

For instance, the Revised Statutes of the State of New York enact, that "Every conveyance or assignment, in writing or otherwise, of any estate, or interest in lands or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void." And the decisions upon the above and similar enactments will afford a guide for the construction of the provisions of this act upon the subject of fraudulent preferences and conveyances.

A merchant being insolvent, sold his whole stock of goods to an infant, who was his clerk and brother-in-law, took his notes for the price, and ran away. Held, that the assignment was a fraud upon

creditors, and a verdict to the contrary should be set aside.—Supreme Ct., 1844, *Vance vs. Phillips*, 6 Hill, 433.

An insolvent, against whom suits were pending, conveyed land to his brother for an inadequate price, which did not clearly appear to have been paid, and the conveyance was for some time kept secret, and there was no proof that it was executed when it bore date, and the grantor still continued in possession, erecting buildings, and receiving rents and profits. Held, that the deed was fraudulent and void, as against a subsequent purchaser of the land, at a sale under an execution against the grantor.—Court of Errors, 1817, *Sands vs. Hildreth*, 14 Johns., 493; affirming S. C., 2 Johns. Ch., 35.

A transfer by one insolvent partner, made after a dissolution of the firm and in fraud of the creditors and solvent partner, to one having notice, is void.—Supreme Ct., Sp. T., 1847; *Geortner vs. Trustees of Canajoharie*, 2 Barb., 625.

A father, to defraud his creditors, bought land before the Revised Statutes, and took a deed in his son's name. Held, that no trust resulted to the father, for the conveyance was fraudulent.—Supreme Ct., 1849, *Proseus vs. M'Intyre*, 5 Barber, 424.

The prohibition of 1 Revised Stat., 603, § 4, that no incorporated company shall make an assignment in contemplation of insolvency, applies to associations organized under the General Banking Law.—Ct. of Appeals, 1860, *Robinson vs. Bank of Attica*, 21 N. Y. 406.

A debtor's conveyance of all his property, without consideration, and with intent to defeat debts which exceed the value of the property, is void as against existing creditors.—2 Rent. Com., 440; N. Y. Superior Ct. 1859, *N. Y. and Harlem R. R. Co. vs. Kyle*; 5 Bos., 587.

It was held that a deed not fraudulent at first, may become so by being concealed, or not pursued, by which means creditors are drawn in to lend their money.—2 Vern., 261; *Chancery*, 1816, *Hildreth vs. Sands*, 2 Johns. Ch., 35.

Assignments giving preferences have never been favored by the courts, and will only be upheld when they fulfill the conditions which the law finds it necessary to prescribe to prevent fraud. Among these are, that the debtor shall devote all his property to the satisfaction of his debts, without condition or qualification, and that he shall reserve nothing from the assigned property to himself until all his creditors are paid. He may prescribe the order in which payments shall be made, giving preferences to favored creditors; but if he reserves any part of the estate to his own use, or for the benefit of himself in any way, until the debts of all his creditors are satisfied, the assignment will be adjudged fraudulent and void.—Supreme Ct., 1862, *M'Clelland vs. Remsen*, 26 Barb., 622; S. C., How. Pr., 175.

A conveyance executed after insolvency, and after legal proceedings had commenced, was upheld against the creditors on the ground that it was only fulfilling a parol partition which had been made in good faith many years before, and under which possession had been meanwhile assumed.—*Bilsborou vs. Titus*, 15 How. Pr., 95.

The bankrupt, before committing any act of bankruptcy, assigned to an agent a bill of lading and invoice to secure particular creditors, saying, in a letter of instruction to their agent, "This is intended to secure them, let our business take what turn it may, unless they sue, and then you can pay the whole to C," another creditor. Held, a voluntary preference on the eve of bankruptcy, and in contemplation of it, and therefore void.—*Supreme Ct., 1806, Ogden vs. Jackson, 1 Johns., 370.*

It was held under the Bankrupt Law of 1841 that a debtor on the eve of bankruptcy could not transfer goods to a favored creditor in payment of his claim, so as to vest in the creditor any title as against assignees afterward appointed.—3 Wils., 27, *Mayor's Ct., 1802*; *Waddington vs. Morris, Liv. Jud. Op., 52.*

Even if an act of bankruptcy be contemplated by the debtor, yet if, at the instance and on the application of the creditor, he makes payment or assigns property to him, such payment or assignment is valid as against the assignees of the bankrupt.—*Court of Errors, 1809, Phoenix vs. Dey, 5 Johns., 412.*

Of the degree of pressure or urgency of solicitation on the part of the creditor necessary to bring the case within this rule, vide *Ogden vs. Jackson, 1 Johns., 370*; *Phoenix vs. Dey, 5 id., 412.*

Under the United States Bankrupt Act of 1800 it was held that a payment of a particular creditor, made after June 1, 1800, but in the hope of being ultimately able to pay all debts, under peculiar circumstances, was not fraudulent, as made in contemplation of bankruptcy.—*M'Menomy vs. Ferrers, 3 Johns., 71.*

It was decided under the Bankrupt Act of 1841, which declares all payments, assignments, etc., in contemplation of bankruptcy, for the purpose of giving preferences, void, means in contemplation of a state of bankruptcy, or rather of actually stopping business because of insolvency.—5 Law R., 2; *Story's R., 349*; 2 N. Y. Leg. Obs., 131; *Av. Chan. Ct., 1846, Freeman vs. Deming, 3 Sandf. Ch., 327.*

Such payments and assignments are void only in reference to proceedings under the Bankrupt Law.—*Chancery, 1848, Seaman vs. Stoughton, 3 Barb. Ch., 344.* To the same effect, 1843, *Dodge vs. Sheldon, 6 Hill, 9.*

The confession of judgment by a debtor in contemplation of bankruptcy, in order to prefer one creditor to the general creditors, is a fraudulent preference within the act, and the judgment entered on such confession is void, and of course no lien attaches under it.—*M'Lean vs. Lafayette Bank, 3 M'Lean, 185.* A judgment confessed by a bankrupt within two months before the filing of his petition, where the bankrupt had broken up his business, was held fraudulent, and also all the proceedings under it.—*M'Lean vs. Lafayette Bank, 3 M'Lean, 587.* A confession of judgment at the instance of the plaintiff to secure him from liabilities contracted for the defendant, all of which became due four months before the defendant filed his petition in bankruptcy, was valid under the Bankrupt Law as against subsequent judgment creditors.—*Wilkinson's Appeal, 4 Barr., 284.*



The words "in contemplation of bankruptcy," as used in the Bankrupt Law, mean a contemplation of a state of bankruptcy merely, and not an intention to take the benefit of the Bankrupt Law. And this means more than an inability to pay debts promptly. It contemplates a thorough breaking up of business.—Everett vs. Stone, 3 Story, 446; Winsor vs. Kendall, 3 Story, 507.

A and B, partners, made certain conveyances of the bulk of their property to a certain creditor to the amount of \$36,000, being at the same time indebted to an equal amount, and subsequently became bankrupts. Held, that such a conveyance was in contemplation of bankruptcy, and in fraudulent preference of creditors.—Peckham vs. Burrows, 3 Story, 544. The same case also decided, that to constitute a conveyance in contemplation of bankruptcy, it is not necessary that the preferred creditor should know of the debtor's insolvency, or should co-operate with him to obtain a priority of payment. A mortgaged to B the whole of his stock in trade, and nearly all of his real estate, to secure a debt due from him to B, and on the same day presented his petition for adjudication of bankruptcy. Subsequently B assigned to the Cohasset Bank and others all his right, title, and interest in the said stock and real estate. Held, that the mortgages were in contemplation of bankruptcy within the meaning of the Bankrupt Act of 1841, and were therefore void, and that it was immaterial whether the mortgagee did or did not know that a fraudulent preference was intended in his favor, if it were actually given.—Morse vs. Godfrey, 3 Story, 364.

The pendency of proceedings in bankruptcy is sufficient constructive notice to all grantees or assignees of property proceeding from the bankrupt; and in the case last cited a definition of a *bond fide* purchaser is given in the following terms: To constitute a *bond fide* purchaser for a valuable consideration, the sale must be for a *new consideration*; and the transfer of property merely as a new security for old debts and liabilities, without extinguishment or surrender of such debts, or of the old securities therefor, is not sufficient. Where two partners in trade, apprehending embarrassment in their business, conveyed all of their stock and real estate and promissory notes to secure them against certain debts and liabilities which they had incurred as sureties for the two partners, actions were afterward commenced on certain of the debts so secured, upon which judgment was obtained, and execution was levied; but before the judgment was obtained, the two partners became bankrupts under the Bankrupt Law of 1841. The personal chattels so assigned were sold previous to the bankruptcy, and the proceeds were applied to the payment of the said debts. Held, that the assignment was an act in contemplation of bankruptcy, and in preference of certain creditors, and was therefore void; that the judgments were not valid liens within the saving of the last proviso of the act; that the proceeds of the personal chattels sold and applied to the payment of the debt could be followed by the assignee, and made assets in bankruptcy; and that the said fraudulent conveyance was a bar to the bankrupt's Discharge.—Everett vs. Stone, 3 Story, 446.

Where, however, the preference has been given by a bankrupt, induced by an agreement between the parties for the creditor's security, and which the creditor called upon the bankrupt, in compliance with his agreement, to execute; it was held, that the payment or assignment of assets by a debtor, under such circumstances, is not voluntary, and not void as a fraudulent preference under the Bankrupt Law.—*Smoot vs. Morehouse*, 8 Ala., 370.

Under the Bankrupt Law, any act done in contemplation of bankruptcy, or when in a state of insolvency, whereby preference is given to particular creditors, is void.—*Collins vs. Hood*, 4 M'Lean, 186.

Where a debtor, in contemplation of taking the benefit of the Bankrupt Act of 1841, confessed judgment to his creditor to give him a preference over other creditors, the creditor being in no way a party to the fraudulent transaction, such judgment was not sufficient to avoid the title of the creditor to the real estate of the debtor purchased at a sale under execution on such judgment.—*Fenelon vs. Lonergan*, 29 Penn. State Rep., 471.

A debtor was declared a bankrupt on a petition filed against him by his creditors September 21, 1842. It appeared that, August 5, 1842, the bankrupt had made a mortgage of land to secure a note due of one of his creditors. The security was given at the urgent request of the creditor, and the bankrupt testified that, though he was in fact at the time deeply insolvent, he supposed he could go on and pay his debts, and that he did not at the time intend to petition, nor expect to be proceeded against in bankruptcy. Held, that the mortgage was valid, and not within the condemnation of the provisions of the second section of the Bankrupt Act.—*Dow vs. Sargent*, 15 N. H., 115.

Whether the payment to a creditor is to be deemed a fraudulent preference or not, must depend upon the circumstances of each particular case. When the payment is not made in the ordinary course of business, or under threats or suits, but a creditor who is a relation or a friend is selected, and payment is made to him, either before the debt is due, or after the debt is due, upon the eve of bankruptcy, without any pressure on the part of such creditor, all the authorities, both American and English, establish that such facts afford an almost irresistible conclusion, that the payment is preferential, and a fraud upon the Bankrupt Law.

A voluntary payment or transfer by an insolvent debtor, who is going on with his business with a *bond fide* intention and expectation of saving himself from failing, and of paying his debts, is not an unlawful preference within the meaning of the Bankrupt Law; and, in order to substantiate that the transfer was made in contemplation of bankruptcy, it should appear that the debtor acted in the anticipation of failing in his business—of committing an act of bankruptcy, or of being declared bankrupt at his own instance, on the ground of inability to pay his debts, and intending to defeat the general distribution of effects which takes place under a proceeding in bankruptcy.—*In re Pearce*, 21 Vermont, 6 Washb., 611.

It was held under the Bankrupt Law of 1841, that a voluntary assignment, for the benefit of creditors made after the passage of that law, and before it went into operation, and preferring some creditors to others, was a fraud upon the law, and the assignee appointed under it was entitled to recover the property assigned.—*Cornwell's Appeal*, 7 Watts. & Serg., 305.

An assignment for the benefit of creditors making preferences, made after the passage of the Bankrupt Law of 1841, by one hopelessly insolvent, and within five months previous to his application for the benefit of the act, was held to be void, as being in contemplation of bankruptcy.—*Freeman vs. Denning*, 3 Sanford, Chan. Rep., 327.

The fact that a debtor knows himself to be insolvent at the time of giving a preference, is no ground for impeaching the transaction, unless the debtor contemplated bankruptcy at the time.—*Phoenix vs. Ingraham*, 5 John. Rep., 412.

A transfer by an insolvent person of all his property to a creditor ten days before applying for the benefit of the Bankrupt Law, is void under that law, although at the time of making the transfer the debtor did not intend to take the benefit of the law.—*M'Alister vs. Richards*, 6 Barr., 133.

An assignment made by a debtor of his property in contemplation of bankruptcy, and for the purpose of giving preferences, is not absolutely void for all purposes; it is only void as against an assignee properly appointed under the Bankrupt Act.—*Seaman vs. Stoughton*, 3 Barb., Chan. Rep., 344.

An assignment by a debtor in contemplation of bankruptcy of all his effects, for the benefit of his creditors, to one who is not a *bond fide* creditor or purchaser without notice, was held to be void under the Bankrupt Law of 1841.—*M'Lean vs. Meline*, 3 M'Lean, 199; *M'Lean vs. Johnson*, 3 M'Lean, 202. Such assignment, though valid under the law of the State, being void under the Bankrupt Law, the property may be seized on execution upon judgments regularly obtained without fraud before the filing of the petition in bankruptcy.

Where a trader gives a mortgage to one of his creditors, in contemplation of bankruptcy, and for the purpose of giving such creditor a preference over the others, it is an act of bankruptcy within the meaning of the statute of the United States of 1841.—*Arnold vs. Maynard*, 2 Story, 349.

A conveyance or transfer by a debtor, in contemplation of bankruptcy, does not necessarily mean in contemplation of his being declared a bankrupt under this statute, but in contemplation of his actually stopping his business, because of his insolvency, and incapacity to carry it on. Vide case last cited. The confession of a judgment to a creditor, with a view to prefer him, is not invalid under the Bankrupt Law of 1841, if it be not voluntary, but the effect of measures taken by the creditor, or in his power to take; and the burden is upon the party seeking to avoid the transaction to show

that it was voluntary.—*Haldeman vs. Michael*, 6 Watts & Serg., 128.

A judgment by confession is not void, because confessed only ten days before the filing a petition by the debtor to be declared a bankrupt. It must have been confessed in contemplation of bankruptcy, voluntarily, and with a view of giving a particular creditor a preference over the general creditors.—*Taylor vs. Whitthorn*, 5 Humph., 340.

Where a husband conveyed by way of release to his wife, for her sole use and benefit, all the right, title, and interest he had acquired by virtue of their marriage, to certain stock in an incorporated company, as also the right to sue the company for permitting the unlawful transfer thereof, such a conveyance will be inoperative at law; and the rights of the husband attempted to be released will, upon his being declared a bankrupt, vest in the assignees under his bankruptcy.—*Butler vs. Merchants' Insurance Company*, 8 Ala., 146.

Where the grantor of a deed made to defraud creditors afterward became bankrupt, and such deed having been declared fraudulent and void, the grantee was held accountable for the rents and profits subsequent to the acts of bankruptcy, or from the time when the right of the creditors to call him to an account accrued.—*Sands vs. Codwise*, 4 Johns., 536.

Giving a voluntary preference to one creditor was held not to be an act of bankruptcy, though if given on the eve of bankruptcy, and in contemplation thereof, it was void.—*Harrison vs. Sterry*, 5 Cranch, 301; *Locke vs. Winning*, 3 Mass., 325; *Ogden vs. Jackson*, 1 Johns., 370.

Paying money or giving security to a creditor, in contemplation of bankruptcy, and with a view to prefer him, was held to be a valid transaction, if it was not voluntary, but the result of measures taken by the creditor.—1 Johns., 370; *Phoenix vs. Dey*, 5 Johns., 412; *M'Meehan vs. Grunvy*, 3 Har. & J., 185.

A debtor had engaged, to transfer bank stock to B to secure him from loss by indorsing the debtor's notes. Not having the stock when applied to for the transfer, the debtor, at B's instance, conveyed land to C, who took up the notes. Held, that though the debtor had committed an act of bankruptcy before he conveyed the land, yet the conveyance was valid, and that B's preference thus obtained was only a substantial fulfillment of the debtor's original engagement when B indorsed the notes.—3 Har. & J., 185.

The policy of the Bankrupt Law of 1841 was to secure equality among the creditors, and to prevent the debtor giving all his property to some, to the exclusion of others.—*Ex parte Breneman*, Crabbe, 456.

An assignment of all a man's property, made for the benefit of certain creditors, is an act of bankruptcy, though made without moral fraud; and assignments with preferences have been held valid only on the ground that there was no Bankrupt Law in existence at the time.

Two years before the passage of the Bankrupt Act of 1841, property was conveyed by a debtor to prevent an attachment thereof on a debt due at the time of the conveyance. Held, that it could not be regarded as made in contemplation of bankruptcy, and could not invalidate the bankrupt's Discharge.—*Gove vs. Lawrence*, 6 Foster, N. H., 484.

A conveyance or assignment which is fraudulent at common law is an act of bankruptcy, and so is every conveyance or assignment which contravenes the provisions and objects of the Bankrupt Law, though good at common law.—*Gassett vs. Morse*, 21 Vermont, 6 Wash., 627. Vide also *Bell vs. Leggett*, 2 Sandford, Sup. Ct. Rep., 450, in which a very able judgment was pronounced, conflicting, to some extent, with other American decisions on this question, and deciding that a conveyance or assignment by a trader in embarrassed circumstances of *all his effects* to a particular creditor, whether voluntary or under pressure of legal process, or with intention to take the benefit of the Bankrupt Act or not, was an act of bankruptcy within the meaning of the Bankrupt Law of 1841; and it will be found that most of the English cases support the view, that if a debtor in insolvent circumstances transfers all his property in trade, and *all his effects*, to one particular creditor, it virtually defeats the object and intention of the Bankrupt Law, which is based upon a general distribution of the assets of the insolvent debtor among his creditors. The fact of such a transfer incapacitates the debtor from carrying on his trade, and the act of such transfer itself is pregnant with notice to the transferee of the object of the debtor in making it.

A creditor could not, by commencing proceedings in a State Court, after the commission of an act of bankruptcy by his debtor, obtain a valid lien upon the property conveyed by a fraudulent deed, the execution of which constituted the act of bankruptcy, if such creditor had notice thereof; and such property passes to the assignee in bankruptcy.—*Shewhan vs. Wherroot*, 7 How., U. S., 627.

In order to make a security void, as given "in contemplation of bankruptcy," within the meaning of the United States Bankrupt Act of 1841, the debtor must at the time have contemplated an act of bankruptcy, or a decree adjudging him a bankrupt on his own petition.—*Buckingham vs. McLean*, 13 How., U. S., 151.

Under the Bankrupt Law a sale of property to a creditor more than thirteen months before the debtor applied for the benefit of the law, and without knowing that the debtor contemplated going into bankruptcy, and made by the vendee *bona fide*, is valid.—*Ashby vs. Steere*, 2 W. & M., 347. Such a sale, if done as a preference of one creditor over another, where the debtor contemplated going into bankruptcy, might prevent him from getting his Discharge, and might be in him an act of bankruptcy, but still be valid in regard to the creditor; and the same case decides, that while in England the contemplation of bankruptcy means the benefit of the Bankrupt Act, in this country it has been construed to mean in-

solvency. But, with all respect to this decision, it is suggested that, if the preference to the creditor might be in the debtor an act of bankruptcy, it could not be valid in favor of the creditor.

To make a judgment void under the provisions of the Bankrupt Law of 1841, it must have been given, not only to effect a preference, but in contemplation of bankruptcy.—*Atkinson vs. The Farmer's Bank, Crabbe, 529.*

A judgment or preference in fraud of the act can be set aside only in the court where the bankrupt's proceedings are had. *Vide case last cited.*

Where a defendant confessed judgment after suit commenced, and stipulated for delay, the confession under such circumstances repels the conclusion that it was voluntary, and made with a view to prefer such creditor.—*Taylor vs. W. Witthorn, 5 Humph., 340.*

An assignment of *part* of a debtor's effects when he is a trader, even on account of a by-gone and pre-existing debt, does not, like an assignment of the *whole*, carry with it intrinsic evidence of fraud, since every trader must in the course of his business have power to make over some portions of his property to creditors. The onus of proving that it is the whole of the trader's property is upon the assignees.—*Chase vs. Goble, 2 Mann. & G., 930.*

Whether such an act be a *fraudulent preference*, must be ascertained by putting it to the jury to say whether the transaction took place in contemplation of bankruptcy, and *voluntarily*, or under fear and compulsion. It is not necessary that, to render a preference on the eve of bankruptcy valid, there should be a threat or pressure with an immediate power of rendering it available by taking legal steps. To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent, as against the body of creditors, by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy; and if made in consequence of the act of the creditor, it is not voluntary.—*Casteel vs. Booker, 2 Exchq., 691.* Mr. Baron Parke, in the case of *Mogg vs. Baker, 4 Mees & W., 348*, thus states the law: "It is not necessary that the creditor in the first instance is to show 'pressure,' the assignees must show that the conveyance or transfer originated in the voluntary act of the insolvent; whereas here it is made in consequence of the creditor asking it." It will be observed that all the cases, without a single exception, where the assignment of property by a trader has been deemed fraudulent, and an act of bankruptcy, are cases where the assignment was made, either without consideration, or for a before-contracted debt. A trader may *sell* the whole or any part of his stock in trade to a fair and *bond fide* purchaser, without thereby committing an act of bankruptcy. An assignment made to secure advances by a person lending *bond fide*, will be supported on the same grounds, unless after notice of the bankruptcy.—*Green vs. White, 3 Bing., N. C., 59; Baxter vs. Pritchard, 1 Ad. & E., 456*, and cases there cited; *Young vs. Waud, 8 Exchq., 221.*

A *sale*, being expressly named, in the third subdivision of the sec-

tion, comes within its provisions, but it is not in its nature exposed to the same suspicion as most other transactions; *a sale* can not in reason be held to be a fraudulent transfer, and void, unless it takes place under such circumstances that the purchaser, as a man of business and understanding, ought to suspect and believe that the seller means to get money by it for himself in fraud of his creditors, and that the sale is made for such purpose; as, for instance, where the buyer, as a man of business, must know that he is purchasing the property much below its real value.—*Devas vs. Venables*, 3 Bing., N. C., 400; *Hill vs. Furnell*, 9 B. & C., 45; *Bishop vs. Crawshay*, 3 B. & C., 415. The doctrine with regard to a *sale* has been carried still further in many English authorities, which seem to have decided, that if a *bond fide* agreement be entered into by which a trader contracts, for good consideration, to transfer to another person, even by way of security, property, or a chose in action, or a fund, which the trader, though he has it not in his present possession, will be entitled to receive at some future period, such agreement will operate as an equitable assignment of that property or fund, and will entitle the transferee to receive it, whatever may be the state of the trader's affairs between the time of the agreement and of the transferee's claim of possession.—*Dangerfield vs. Thomas*, 9 Ad. & E., 292; *Walker vs. Rostrom*, 9 Mees & W., 411; *Douglass vs. Russell*, 4 Simon, 524; *Hunt vs. Mortimer*, 10 B. & C., 44; *Hutchinson vs. Heyworth*, 9 Ad. & E., 375; *Belcher vs. Oldfield*, 6 Bing., N. C., 102.

A transfer is fraudulent if it contravenes the policy of the Bankrupt Law, which is an equal distribution of the bankrupt's assets, and so defeats or delays his creditors; therefore an assignment of his whole property, or of the whole with an exception merely nominal, in consideration of a by-gone and pre-existing debt, thought not fraudulent by a non-trader, is fraudulent under the English Bankrupt Act.—*Worsley vs. Demattos*, 1 Burr, 467; *Porter vs. Walker*, 1 Mann. & G., 686; *Lindon vs. Sharpe*, 6 *id.*, 895. If it be an assignment of a specified portion, it must be proved to be such as would cause insolvency; and if of all property at a specified place, that it is substantially the whole of the trader's property.—*Chase vs. Goble*, 2 Mann. & G., 930; *Carr vs. Burdiss*, 1 C., M. & R., 447.

It would not be correct to leave it as a question to the jury whether the deed being acted upon, would prevent the trader carrying on the particular business in which he is engaged, but it must be a transfer of so much of his property as would prevent him carrying on business by reason of his thereby becoming insolvent.—*Wedge vs. Newlyn*, 4 B. & Adol., 831; *Wood vs. Waud*, 22 L. J. Ex.; *Harris vs. Rickett*, 4 H. & N., 28; 28 L. J. Ex., 47.

But though not fraudulent or void *per se*, yet if made in contemplation of bankruptcy, and with an intent to give the transferee an undue advantage over other creditors, it is fraudulent and void. And that, although it took place more than two months before the filing of the petition, *Bevan vs. Nunn*, 9 Bing., 107, and though

not formerly so, it is now, by the section we are considering, an act of bankruptcy. Whether an act be or not of this description, in other words, whether it be or not a fraudulent preference, must be ascertained by putting it to a jury to say whether the transfer, delivery, etc., were made in contemplation of bankruptcy and voluntary, or under fear or compulsion.—*Belcher vs. Prittie*, 10 Bing., 408; *Cook vs. Rogers*, 7 *id.*, 438; *Fidgeon vs. Sharp*, 5 Taunt., 539; *Cook vs. Pritchard*, 3 Mann. & G., 329; *Morgan vs. Brundet*, 2 Nev. & M., 280; 5 B. & Adol., 297; *Bevan vs. Nunn*, 9 Bing., 107; *Hartshorne vs. Hodden*, 2 B. & P., 582; *Gibbon vs. Phillips*, 7 B. & C., 529; *Poland vs. Glyn*, 4 Bing., 22, n.; *Hook vs. Jones*, *id.*, 20; *Wheelwright vs. Jackson*, 5 Taunt., 109; *Moore vs. Barthrop*, 1 B. & C., 5; *Crosby vs. Crouch*, 11 East., 256; *Thompson vs. Freeman*, 1 T. R., 155; *Smith vs. Payne*, 6 *id.*, 152; *Bayley vs. Ballard*, 1 Camp., 416; *Singleton vs. Butler*, 2 B. & P., 283; *Churchill vs. Crease*, 5 Bing., 177; *De Tastet vs. Carroll*, 1 Stark., 88; *Morgan vs. Horseman*, 3 Taunt., 41; *Abbott vs. Pomfret*, 1 Bing., N. C., 462; *Morgan vs. Brundrett*, 5 B. & Adol., 289. In order to make the delivery fraudulent, it must not only have been made at a time when the trader contemplated the event of his own bankruptcy, but it must also have been voluntary; and therefore a delivery under the threat or apprehension of *criminal* or *civil* process is valid. This distinction, viz., between a voluntary transfer in contemplation of bankruptcy, and a transfer either voluntary but not in the contemplation of bankruptcy, but involuntary and under the pressure of threat or compulsion, is the distinction upon which all modern cases turn. Several of these cases are referred to above, but the dependence of each upon its own peculiar circumstance renders it impossible to give a full account of them.

The declaration of the debtors at the time of the transfer, or connected with it, are admissible in evidence to show the intention with which it was made.—*Ridley vs. Gyde*, 9 Bing., 349; *Rouch vs. G. W. Railway*, 1 Q. B., 51; *Phillips vs. Eamer*, 1 Esp., 355. In *Ridley vs. Gyde*, the declarations were made a month after the disputed act. But see *Lees vs. Marton*, 1 M. & Rob., 210; see also *Smith vs. Cramer*, 1 Bing., N. C., 585.

A, a soap and alkali manufacturer, being indebted to a banking company, assigned to them, to secure future advances, his leasehold property, with all his stock in trade, utensils, and effects therein, and also a policy of insurance, as a security for moneys advanced or to be advanced. The deed contained a power of sale, and a proviso that the trader should remain in possession until default. The assignment did not include another part of A's property equal in amount to the debt covered by the security. In an action by A's assignees to recover part of the property assigned, the jury found that the deed was not executed in contemplation of bankruptcy. It was held, that it was a valid deed, and did not amount to an act of bankruptcy.—*Carr vs. Burdiss*, 1 C., M. & R., 433, 722; *Johnson vs. Fesemeyer*, 3 De Gex & S., 13.

A sale of all his property by a debtor, although he intends to run



away with the money, has been held not within this section, *Baxter vs. Pritchard*, 1 Ad. & E., 456, recognized in *Lindon vs. Sharpe*, 6 Mann. & G., 906, because the trader gets a present equivalent for his goods, and the sale is in the course of his business.—*Graham vs. Chapman*, 21 L. J., C. P., 173. And the sale of *part* of a trader's stock for the fair price of that part is of course unobjectionable. But the Court of Common Pleas in England, after commenting upon *Siebert vs. Spooner*, 1 Mees & W., 714; *Lindon vs. Sharpe*, and *Whitwell vs. Thompson*, 1 Esp., 68, recently intimated their opinion, that an assignment, though made *bond fide*, of the whole of a trader's stock for the price of a part, not because the trader is obliged under pressure to sell his stock for less than its value, but because an old debt is taken as part of the price, though the moving cause of the transfer may be a new advance, is a fraudulent transfer, and an act of bankruptcy. And at all events it is so, even without fraud in fact, if it conveys all the trader's property, including the sum advanced, and professes to give the assignee a right to take the trader's future acquired property upon non-payment of his debt within a certain time.—*Graham vs. Chapman*, 21 L. J., C. P., 173.

The conveyance must have been completely executed so as to divest the trader of the property, and the delivery of such a deed as an escrow would not be an act of bankruptcy.—*Bowker vs. Burdekin*, 11 Mees & W., 146; *Reynolds vs. Hall*, 4 H. & N., 519; 28 L. J., Ex., 257.

It is apprehended that the transfer of choses in action, whether seizable in execution or not under this section, would be void as against assignees.—*Norcutt vs. Dodd*, *Craig & Phil.*, 160; 1 Smith's Leading Cases, 13 d.; *Graham vs. Furber*, 23 L. J., C. P., 5.

In extension of the strict words of the Bankrupt Acts, the courts in England have further held, that a transfer by a trader of part of his property to a creditor in consideration of a by-gone and pre-existing debt, thought not fraudulent within the Statute of Elizabeth, is fraudulent as an act of bankruptcy under the Bankruptcy Act, if made voluntarily and in contemplation of bankruptcy.

A multiplicity of cases have occurred upon the meaning of the word "voluntary," and in contemplation of bankruptcy; for both circumstances must occur, *Gibbon vs. Phillips*, 7 B. & C., 529; *Brown vs. Kempton*, 19 L. J., C. P., 169; if, *in consequence of the act of the creditor, it is not voluntary*, although the creditor may not have power to obtain immediate benefit to himself by taking legal steps, *e. g.*, a surety, or one to whom the debt is due, but not payable.—*Van Casteel vs. Booker*, 2 Ex., 691; *Mogg vs. Baker*, 4 Mees & W., 348. The fact of pressure is not sufficient, if the jury believe that it did not cause the transfer, nor, on the other hand, does it follow as a matter of law, though it is a strong presumption of fact, that because the first step in the transaction resulting in the preference was taken by the bankrupt, that it was therefore voluntary.—*Cook vs. Pritchard*, 5 Mann. & G., 329; *Edwards vs. Glyn*, 5 Jur., N. S., 1397. This definition of "voluntary" will render all

the cases under the Insolvent Acts (which almost invariably use the term "voluntary") applicable.—*Doe vs. Gillett*, 2 C., M. & R., 581; *Arnell vs. Beau*, 8 Bing., 87, 91. The definition given in that case is a conveyance or gift, made without such valuable consideration as is sufficient to induce a party acting really and *bond fide* under the influence of such consideration, or made in favor of a particular creditor spontaneously, and without any pressure on his part to obtain it. In *Mogg vs. Baker* (4 Mees & W., 348), it was held, that a conveyance, in pursuance of a *bond fide* demand, was good; for that pressure, or an apprehension that, by not making the payment, he, the insolvent, would be in a worse condition, was unnecessary; and if there be pressure, it is immaterial that the trader also desires to give a preference to the creditor in the event of bankruptcy.—*Brown vs. Kempton*, 19 L. J., C. P., 169.

Many of the decisions as to the meaning of *contemplation of bankruptcy* can not be reconciled. In some, contemplation of actual bankruptcy has been held essential, and contemplation of mere insolvency insufficient. In other cases, the contemplation of bankruptcy has been inferred from that of insolvency, because men's acts must be construed as done with the intention of producing their natural consequences. More recently it has been laid down that it is a question for the jury in each case, and that contemplation of bankruptcy need not be negatived, because there was contemplation of insolvency; but that if, at the time of the transfer, etc., the debtor considered that he was likely, from the condition in which he stood, to become a bankrupt, and he knew that his assets were inadequate to the payment of all his creditors, the fraudulent preference would be established.—*Morgan vs. Brandrett*, 5 B & Adol., 289; *Aldred vs. Constable*, 4 Q. B., 684; *Gibson vs. Muskett*, 8 Mann. & G., 158; 4 *id.*, 160, 171; *Brown vs. Kempton*, 19 L. J., C. P., 169.

Lord Justice Knight Bruce decided, that hopeless insolvency, so that there is not a reasonable expectation of avoiding bankruptcy, was sufficient to constitute contemplation of bankruptcy.—*Ex parte Simpson*, 1 De Gex, 9. The intent to benefit the creditor has been held essential, *Belcher vs. Jones*, 2 Mees & W., 258; but in *Marshall vs. Lamb*, 5 Q. B., 115, it was held, that a payment may be void as a fraudulent preference, if by it the equal distribution of the estate be defeated, although the bankrupt did not intend to benefit, nor did in fact benefit, the creditor.

It is held, on the subject of fraudulent preference, that if a banker intending to prefer A, give notice to him of the state of his circumstances, in order that he may draw out his private balance, which A not only does, but also draws out that of a company of which he was a director, that is not a fraudulent preference of the company, for a preference must be *intentional*, and here there was no intention to prefer them.—*Belcher vs. Jones*, 2 Mees & W., 258.

It has been said by Lord Mansfield, that "the principles of common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by Stat. 13 Eliz., c. 5." The question,

whether a gift be fraudulent in the meaning of this Statute, is very different indeed from the question, whether, if made by a trader, it would be fraudulent, and an act of bankruptcy within the meaning of the Bankrupt Act. The latter question may be answered in each case by reference to one of the three following rules:

1. Any transfer which is fraudulent within the meaning of the Statute of Elizabeth, is also fraudulent, and an act of bankruptcy under the Bankrupt Act, and void as against the assignees.—*Doe d. Gumsby vs. Ball*, 11 M. & W. 531, and judgment of Lord Wensleydale in *Billiter vs. Young*, 6 E. & B., 17.

2. Any conveyance to a creditor by a trader of his whole property, or of the whole with an exception merely nominal, in consideration of a by-gone and pre-existing debt, though not fraudulent within the Statute of Elizabeth, is fraudulent under the Bankrupt Act, and an act of bankruptcy.—*Lindon vs. Sharp*, 7 Scott, N. R., 730; *Graham vs. Chapman*, 12 C. B., 85; *Hutton vs. Cruttwell*, 1 E. & B., 15; *Smith vs. Cannan*, 2 E. & B., 35; *Bittlestone vs. Cooke*, 6 E. & B., 296; *Bell vs. Simpson*, 2 H. & N., 410; *Harris vs. Rickett*, 4 H. & N., 1. The note to *Graham vs. Chapman*, 12 C. & B., 94, *a*, as to the date of the introduction of this rule into the Bankrupt Law, is erroneous, *Law vs. Skinner*, 2 W. Bl., 996, having been decided in 15 Geo. III., not Geo. II., as there incorrectly stated upon the authority of *Worsley vs. De Mattos*, 1 Burr., 467, decided in 31 Geo. II.

3. A transfer of a trader of part of his property to a creditor in consideration of a by-gone and pre-existing debt, though not fraudulent within the Statute of Elizabeth, is fraudulent, and an act of bankruptcy under the Bankrupt Act, if made voluntarily and in contemplation of bankruptcy, or if it otherwise have the effect of defeating or delaying creditors.—*Smith vs. Cannan*, 2 E. & B., 35.

L, a member of the Stock Exchange, had entered into contracts with other members of the Stock Exchange for the sale and purchase of stocks. These contracts purported to be for the delivery of stock to the buyer, but, in fact, the seller had not the stock to deliver, nor any intention of procuring it; and the contracts were really to be carried out by payment or receipt of differences, as stocks might rise or fall. Upon the balance of these transactions L would have to pay a large sum on the account-day. Previous to the account-day L became a defaulter. According to the rules of the Stock Exchange, which are binding upon all its members, the moneys due to a defaulter from other members of the Stock Exchange upon dealings there are got in by the official assignees of the exchange and divided ratably among his creditors on the exchange. The defendant, who was one of the official assignees, accordingly collected the money due to L from the other members of the exchange upon the before-mentioned contracts, and on the 8th of December, 1853, *bond fide* distributed ratably among L's exchange creditors the whole of such money except a sum of £138, which remained in his hands at the time when L was adjudged bankrupt.

On the 23d of November, 1853, L, who had various creditors off the exchange, petitioned the Court of Bankruptcy for a private arrangement with his creditors, under the 211th Section of the Bankrupt Act, 1849; but the necessary proportion of creditors not assenting to the proposals made, the petition was adjourned into court, and L was adjudged bankrupt on the 31st of December, and the plaintiffs were appointed his assignees. The defendant had no notice of any act of bankruptcy committed by L until after he was adjudged bankrupt. In an action by the plaintiffs against the defendant for money had and received, it was held, that as to the money distributed by the defendant before L was adjudged bankrupt, the defendant was not liable, as the plaintiffs' title as assignees could not in such a case relate back to any prior act of bankruptcy; and even if the payments of the money were, as between the bankrupt and the Stock Exchange creditors, a fraudulent preference, which the plaintiffs might disaffirm, they had not done so until it had been paid over by the defendant, and therefore that it never became in his hands money received to their use as assignees.—*Nicholson vs. Gooch*, 34 Eng. Law and Eq., 163.

In England the contemplation of bankruptcy means the benefit of the Bankrupt Act, but in this country it has been construed to mean insolvency.

The preference of a creditor is not the payment of one in the ordinary course of business, or under threats or suits, but selecting one, as a relation or friend, or settling with him before due, or on the eve of bankruptcy, when not pushed by him.—*Ashby vs. Steere*, 2 W. & M. 347.

A made a voluntary assignment of all his estate to the defendant for the benefit of certain creditors. Afterward he applied for the benefit of the Insolvent Laws of Pennsylvania, was discharged, and the defendant appointed his assignee. Under these assignments the defendant obtained possession of and sold the property of A. The latter petitioned for the benefit of the Bankrupt Law, and was decreed a bankrupt. The plaintiff was appointed his assignee, and brought an action of trover to recover the value of the property received under the voluntary assignment. Held, that the plaintiff could not recover.—*Sullivan vs. Hieskill, Crabbe*, 525.

A composition deed made in alleged pursuance of Section 224 of the Bankrupt Law Consolidation Act, 1849, contained a clause which was to operate to defeat any action brought by a creditor, whether one who had executed the deed or not, by making the bringing of such action *ipso facto* a release of the debt; and also a clause enabling any creditor, by leave of the inspectors, notwithstanding the former provision, to bring an action, and, in case of success, to receive dividends upon the amount recovered. Held, that the operation of these clauses was to establish a double inequality; first, in respect of the power of the inspectors to allow an action or not, at their discretion; secondly, in respect of the possible misapplication of the assets in payment of the costs of such

creditors as might by leave of the inspectors bring actions and recover judgment; and, consequently, that the deed was not valid.—*Gardner vs. Chapman*, 8 C. B., N. S., 317.

A trader being indebted to various persons, procured from A an advance of £200, for which he verbally agreed to give a bill of sale of all his property, if called upon to do so. On receiving the money he gave to A a promissory note for £200, a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of insurance, and also another memorandum of agreement to pay £10 yearly as *bonus*. At a later period, on being requested, he executed a bill of sale of all his property to A. Held, 1st, that such bill of sale, having been executed in pursuance of the original agreement, was not an act of bankruptcy; 2d, that evidence of the original verbal agreement was admissible, inasmuch as the subsequent written agreement did not contain, and was not intended to contain, the whole agreement between the parties.—*Harris vs. Rickett*, 4 Hurl. & Nor., 1.

M and S being in embarrassed circumstances, on the 15th of April, 1800, executed a conveyance of certain lands, which, by a declaration in writing executed by them on the 31st of May, 1800, they declared to be in trust to pay particular creditors in preference. On the 18th June, 1800, they drew an order on one F, their agent, directing him to pay to R such moneys of theirs as should come to his hands from certain persons, which order was accepted by F on the same day. On the 11th of July, 1800, M and S committed an act of bankruptcy, and on the 18th of July, 1800, were duly declared bankrupts. In an action brought by the assignees of M and S against F, it was held that the order and acceptance amounted to an assignment, and fixed the fund irrevocably, and that the order was not given in contemplation of bankruptcy, so as to make it fraudulent under the Bankrupt Law.—*M'Menomy vs. Ferrers*, 3 Johns., 71.

This decision was under the United States Bankrupt Act of 1800, which contained the same provisions as this act upon this subject.

Where it appeared that a bankrupt was insolvent on the first day of February, 1842, the day the United States Bankrupt Law went into operation, and that he made a voluntary confession of judgment on that day in favor of one of his creditors for a sum in damages exceeding the value of all his attachable property, and that all his property was taken the same evening, by virtue of an execution upon such judgment, and afterward was sold thereon, and that this was done by the bankrupt for the mere purpose of compelling another of his creditors to make a deduction in the rent of a certain farm, which the bankrupt then occupied as his tenant, and which rent was to become due March 1, 1842; and if that could not be effected, then to defeat the debt of that creditor, the debtor contemplating bankruptcy as the ultimate resort, and the petition in bankruptcy was filed March 30, 1842; the District Court refused to grant to the bankrupt his Discharge, notwithstanding the

debt, upon which the judgment was confessed, was actually due at that time to the creditor in whose favor the confession was made. —*In re Chase*, 22 Vt. ; 7 Washb., 649.

L being in embarrassed circumstances, it was agreed, at a meeting of his creditors, to accept a composition of 12s. in the pound, 10s. to be secured by bills of exchange accepted by B, and the remaining 2s. to be secured by L's promissory note. L agreed to give B a counter-security by assignment of his property and effects. On the 10th October, 1854, a composition deed accordingly was made between L of the first part, B of the second part, and the creditors of L, who should sign within a certain time, of the third part, subject to a condition for rendering it void, unless it should be executed by six sevenths of the creditors, with a covenant not to sue L until default should have been made in payment of the bills of exchange and promissory notes, or any of them. The bill for payment of the first installment having been dishonored, W, one of the creditors, sued L on the original debt, and B on the dishonored bill. L withdrew his pleas, and let W have judgment for the amount of his claim, less the installment, which B paid. By the deed of the 3d of March, 1855, L assigned the whole of his stock and property to B as security for the sums which he had paid, or might pay to the creditors of L in respect of the composition bills; in trover by L against his assignees, held, that there was a good petitioning creditor's debt: for, 1st, though the composition deed was not void by reason of any concealment from the creditors of the fact that the whole of L's property was to be assigned to B, and therefore the debt was suspended, it remained, and upon default in payment of the installment the right of suing for it revived; and 2d, the judgment obtained by W was conclusive, and was an acknowledgment by L that he still owed the debt: also, that the assignment to W was an act of bankruptcy; for a transaction whereby the property of a trader is conveyed to secure a surety to a composition deed against liabilities which he has incurred to the particular creditors who may come in, and which surety can stop the trade at any moment, is not a case where the trader receives an equivalent. —*Leake vs. Young*, 36 Eng. Law and Eq., 188.

There is nothing illegal or contrary to the policy of the Bankrupt Laws in a stipulation by the assignor on an assignment of goods, under which they are to remain in his possession, not to do any act by means of which the goods assigned might become charged or alienated, or whereby the assignment might become ineffective, or the assignor might be deprived of them. And it is a breach of such stipulation for the assignor, while the goods are in his possession, to file a declaration of insolvency, upon which a fiat in bankruptcy issues, under which the goods are seized by the assignees in bankruptcy, as being in the possession and order of the bankrupt as reputed owner, by the consent of the true owner. For there would be nothing illegal or contrary to the policy of the Bankrupt Laws in an express stipulation by the assignor not to file such a declaration, so

that the goods assigned might be liable to be seized in bankruptcy, or while the goods remained in his possession; and his duty would be to give notice to the assignee of his insolvency, that the latter might remove them, and thus they might no longer remain in the possession and order of the assignor as the owner by consent of the true owner. And as the effect of the act of bankruptcy, while the goods so remained in his order or possession, was to vest them in the assignees in bankruptcy, the act of filing the declaration was an "act by means whereof" the assignee was deprived of the goods.—*Hill vs. Cowdery*, 37 Eng. Law & Eq., 553.

It was held under the United States Bankrupt Law of 1841, that a decree by which a man is declared a bankrupt divests him of all his property and vests it in his assignee, who is empowered to sell, sue for, and defend the same in all cases, subject to the orders and directions of the court "as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy, except in the cases specified in the 2d Section of the statute, though such conveyance may have been fraudulent and void as to creditors." The 2d Section makes void "all sales and conveyances made in contemplation of bankruptcy." Therefore, where the conveyance of property *was not made in contemplation of bankruptcy*, the vendor was completely divested of all title to the property, and could not, neither could his assignee, recover it back.—*Porter vs. Douglass*, 27 Miss., 5 Cush., 379.

A conveyed to his father, apparently for a valuable consideration, certain real and personal property, but retained possession of it in 1838. In 1840 the real property was sold by execution against it, but no deed was given to the purchaser. In 1842 A was discharged under the United States Bankrupt Act of 1841. He pleaded his Discharge to a writ of *scire facias* to revive a judgment obtained in 1838; and it was held, that while his Discharge could be pleaded in all courts, it could be impeached for fraud or willful concealment in obtaining it; and his retaining possession of the property which he pretended to have sold his father, and did not include in his inventory, raised a presumption of fraud, on which a verdict of the jury, that it was a fraud, was sustained.—*The State vs. Bethune*, 8 Ired., 139.

A and B entered into partnership in 1841. A, before his marriage, had joined his wife in an ante-nuptial settlement of her property by means of a bond and mortgage of certain property. A part of her property, which the trustee for her had loaned to A, he put into the firm. B was appointed trustee under the settlement, and A secured to him a certain other property belonging to the firm, to secure the loan from his wife's estate. This was done just before the failure. Held, on a bill by B to enforce this security for the trust estate, that this attempt to secure the payment of a debt of one of the firm, by pledging partnership property, was void under the United States Bankrupt Law of 1841.—*Auckar vs. Levy*, 3 Strobb. Eq., 197.

A deed of transfer, although it may be an act of bankruptcy, is not void as against future creditors.—*Oswald vs. Thompson*, 2 Ex. Rep., 215; 17 L. J. Ex., 234. And where a party assigned his property for their benefit, at a time when there was no creditor of sufficient amount to obtain an adjudication, and the trader was adjudicated bankrupt upon his own petition, the assignment was held to be valid against the assignees under his bankruptcy.—*Ex parte Philpott*, 10 Jurist, 717; 1 De Gex, 344.

If an attaching creditor, knowing that proceedings in bankruptcy have been instituted, should nevertheless proceed in his suit to get a judgment against the bankrupt before an assignee was appointed, it would be a fraud on the law; and if such creditor should obtain satisfaction of his judgment, it seems he would not be allowed to retain the money.—*Ex parte Foster*, 2 Story, 131.

An assignment of property which is declared by the 2d Section of the Bankrupt Law of the United States of 1841 to be void, and a fraud upon the act, is void as against those persons only who claim by virtue of the proceedings under that act.—*Atkins vs. Spear*, 8 Met., 400.

It would seem that an assignment, though made *bond fide*, of the whole of a trader's stock for the price of a part, not because a trader is obliged under pressure to sell his stock for less than its value, but because an old debt is taken as part of the price, though the moving cause of the transfer may be a new advance, is a fraudulent transfer, constituting an act of bankruptcy within the 12 & 13 Vict., chap. 106, § 67; at all events, such assignment was held to be an act of bankruptcy, even without fraud in fact, if it conveyed all the trader's property, including the sum advanced, and professed to give the assignee a right to take the trader's future acquired property upon non-payment of his debt within a certain time.—*Graham vs. Chapman*, 11 Eng. Law & Eq. Rep., 498.

Where, on the eve of the bankruptcy, the bankrupt, on being pressed for payment by a creditor, executed to him an assignment of so much of his estate and effects as to render it impossible for him to continue carrying on his trade, this was held to constitute an act of bankruptcy, and to be void as against the general body of the creditors of the bankrupt.—*Ex parte Bailey*, 19 Eng. Law & Eq. Rep., 51.

Payment by a trader, who contemplates bankruptcy, of a debt not then due upon a *bond fide* request of the creditor, is not in law a voluntary payment; the fact of the debt not being due is merely a circumstance for the jury in considering the question of fraudulent preferences.—*Strachan vs. Baston*, 34 Eng. Law & Eq., 492. So where an assignment of all a bankrupt's property required for his trade, as a security for an antecedent debt, had taken place more than twelve months before the petition for adjudication, the assignees, in order to avoid the deed, must show that there still exists a debt which existed at the time of the execution of the assignment.—*Ex parte Taylor*, 35 Eng. Law & Eq., 166.



In August, 1853, and for some months following, a retail draper, who afterward became bankrupt, bought large quantities of goods on credit, and in November, and for some months subsequently, sold them from time to time to the defendant, who was a job dealer, at prices considerably below their real value. Held, that in the absence of proof of the defendant's intention to decamp with the money, or otherwise defraud his creditors, and of the buyer's knowledge of such intention, such sales were not of themselves acts of bankruptcy as amounting to a "fraudulent transfer" within the Bankrupt Act.—*Lee vs. Hart*, 28 Eng. Law & Eq., 531.

The creditors of a bankrupt having assented to a composition of 3s. 6d. in the pound, to which the plaintiff, who was a creditor, was not a party, the same creditors afterward signed a petition for annulling the adjudication of bankruptcy, which the plaintiff refused to sign unless the defendant would give him his guarantee for £167 in part payment of his debt. The defendant accordingly, without the knowledge of the other creditors, gave the plaintiff the guarantee, whereupon the latter signed the petition. Held, in an action on the guarantee, that the same was not in contravention of the Bankrupt Law Amendment Act, 12 & 13 Vict., ch. 106, § 268, and was not fraudulent.—*Smith vs. Saltzman*, 25 Eng. Law & Eq., 476. That statute contains provisions analogous to those in this section.

G, a farmer, who became liable to the Bankrupt Laws as a trader, by possessing two shares in a joint stock bank worth less than £20 each, conveyed all his other property, worth about £3000, to a creditor to secure his debt of £900. Held, that the conveyance might be an act of bankruptcy, as a fraudulent grant with intent to defeat or delay creditors, although the two shares, which were G's only trading property, were not conveyed, and although the conveyance did not stop G's trade as a trader.—*Smith vs. Cannan*, 18 Eng. Law & Eq., 390. Held, further, that the conveyance being of property worth three times the amount of the debt which it was given to secure, did not prevent the deed being an act of bankruptcy; for though the grantee would be a trustee for G as to the amount beyond his own debt, the property could not be taken in execution; and as the common law remedies of the other creditors against their debtor's property would thus be barred, they might consequently be defeated or delayed.—*Id.*

A colorable exception in a grant or conveyance of an inconsiderable part of a trader's property will not prevent the same being considered as an act of bankruptcy; as where a trader made an assignment of the bulk of his property, except his household goods and some other articles, to trustees in trust for the benefit of themselves and the creditors mentioned in a schedule, and in which schedule one creditor was purposely omitted, it was considered an act of bankruptcy, *ex parte Foord*, 1 Burr., 477; and vide *Berney vs. Davison*, 1 B. & B., 408; *Compton vs. Bedford*, B. & B., 362; and so where a trader mortgaged all his stock in trade, ex-

cepting household goods and debts, which were very inconsiderable.—*Law vs. Skinner*, 2 Bl. R., 996. There is a distinction between an assignment by a trader of all his effects for the benefit of his creditors, or to secure a pre-existing debt, and an assignment of all his property for a valuable consideration.—*Whitall vs. Thompson*, 1 Esp., 72; see *Manton vs. Moore*, 7 T. R., 67; *Hunt vs. Mortimer*, 10 B. & C., 44. So a sale to a *bond fide* purchaser of the whole of a trader's stock in trade, he intending to abscond with the money and defraud his creditors, is not an act of bankruptcy.—*Baxter vs. Pritchard*, 1 Ad. & E., 456; *Harwood vs. Bartlett*, 6 N. & C., 61. But an assignment by a trader to a creditor of all his effects and stock in trade is of itself an act of bankruptcy, and the question of fraud should not be left to the jury.—*Siebert vs. Spooner*, 1 M. & W., 714. A sale at a price under circumstances to raise a suspicion in the mind of the buyer as to the intention of the seller to defraud his creditors, is an act of bankruptcy, and the assignees may maintain an action of trover for the goods.—*Cook vs. Caldecott*, M. & M., 522.

A very important question will arise under this section as to the validity of assignments made by debtors, when insolvent, to trustees for the benefit of *all* their creditors, even when made *optima fide*. If executed when they are insolvent, which may be predicated at the time of executing such a deed, and voluntarily, and with a view to prevent their property from coming to their assignees in bankruptcy, or to prevent the same from being distributed under the act, such an assignment would be an act of bankruptcy, and is made void by the provisions of the section. The very object of such a deed is to administer the estate of the assignor among themselves, and to obviate any proceedings under a bankruptcy. This proposition is clearly established by the English authorities, and to avoid the consequences of such a result, such an assignment is made valid upon certain conditions and qualifications. There are no provisions in this section of a similar character; and as the question must come up very early in the administration of the law of bankruptcy under this act, it is desirable to ascertain the state of the English Bankrupt Law upon the subject.

An assignment of all a trader's effects may be an act of bankruptcy, whether it be upon trust for the benefit of one creditor, *Wilson vs. Day*, 2 Burr., 877; *Siebert vs. Spooner*, 1 M. & W., 714; or of several, *Compton vs. Bedford*, 1 W. Bl., 362; or of all, to the exclusion of one, *ex parte Foord*, cited 1 Burr., 477; or even of all, without exception, *ex parte Bourne*, 16 Ves. Jun., 149; *ex parte Smith*, 1 Ves. & B., 518; *Eckhardt vs. Wilson*, 8 T. R., 140; *Kettle vs. Hammond*, 1 Cooke, B. L., 39; or of all who should execute, or who should assent to the arrangement, *ex parte Zurichenbart*, 8 Jur., 1801; 13 Law J., N. S., 19; and though he did not thereby intend to defeat, defraud, or delay his creditors, as that being the necessary consequence of the assignment, he must in law be taken to have intended it, *Siebert vs. Spooner*, 1 M. & W., 714; *Stewart vs. Moody*, 1 C., M. & R., 777; 5 Tyru., 493; or though it

is not signed by the trustee or any creditor, and is not further acted on, and has not been out of the trader's possession, *Botcherby vs. Lancaster*, 3 Nev. & M., 383; 1 Ad. & E., 77; or though it does not purport to convey all his effects, and may have been executed in the hope of obtaining further advances from the creditor, and with the intention of conveying it, and though the advances are accordingly obtained, and the trade carried on for several weeks, and no possession taken in the mean time under the instrument, which was a bill of sale.—13 Law J., N. S., 67. And as it is the execution of the deed that creates the act of bankruptcy, the conveyance produces that effect, although there be a proviso that it shall be void if the trustees think fit, or if any of the creditors refuse his acquiescence, *Kettle vs. Hammond*, 1 Cooke, B. L., 106; *Eckhardt vs. Wilson*, 8 T. R., 140; or if all the creditors do not sign, or if a commission of bankruptcy be taken out within a given period, *Dutton vs. Morrison*, 17 Ves., 199; 1 Rose, 213. It is immaterial whether the assignment is made to secure a present debt, or to indemnify a surety who is only likely to become a creditor.—*Hassell vs. Timpson*, Doug., 89.

An assignment, however, of all the trader's property to trustees for the benefit of all creditors, does not constitute an act of bankruptcy unless a petition of adjudication be filed within three months from the execution thereof; provided the deed is executed by every trustee within fifteen days after the execution of it by the trader, and by every trustee, and be attested by an attorney or solicitor, and notice be given within one month after the execution by the trader, if he reside in London or within forty miles thereof, in the London Gazette and in two London daily papers; and if he reside beyond that distance, then in the London Gazette and one London daily paper, and one provincial newspaper published near to the trader's residence; which notice must contain the date and execution of the deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor. Vide the English Bankrupt Act, 12 & 13 Vict., cap., 106. And such an assignment will only constitute an act of bankruptcy when the creditors do not all assent to the deed; as no creditor who is either a party or privy to the assignment, or has even acted under it, can afterward set it up as an act of bankruptcy.—*Bamford vs. Barron*, 2 T. R., 594, n.; *Marshall vs. Barkworth*, 1 Nev. & M., 279; *ex parte Cawkwell*, 1 Rose, 313. This, however, only estops such a creditor as petitioning creditor, and the assignees under a fiat sued out by him, *Tope vs. Hockin*, 9 D. & R., 881; 7 B. & C., 101; and they can not rely on any other act of bankruptcy on which he could not, and not a person who may happen to be elected an assignee under the commission, *Tappenden vs. Burgess*, 4 East., 230; nor is a party estopped from suing out a commission upon a different act of bankruptcy committed by the trader previously to and independent of the deed.—*Doe vs. Anderson*, 1 Stark., 262.

An assignment for the benefit of all creditors would, but for this section of the English act just referred to, be in every case an act

of bankruptcy, although not available by any creditor party to, privy, or acting under such deed, on the ground that it is defeating the creditors of their rights under the statutes of bankruptcy to an administration according to such statutes, and necessarily preventing the trader from carrying on his trade.—*Jackson vs. Thompson*, 2 Q. B., 887; *Siebert vs. Spooner*, 1 Mees & W., 714; *ex parte Alsop*, 6 Jur., N. S., 282; 30 L. J. Bank., 6.

The bankrupt, before committing any act of bankruptcy, assigned to an agent a bill of lading and invoice, to secure particular creditors, saying, in a letter of instructions to their agent, "This is intended to secure them, let our business take what turn it may, unless they sue, and then you can pay the whole to C," another creditor. Held, a voluntary preference on the eve of bankruptcy, and in contemplation of it, and therefore void.—*Supreme Ct.*, 1806, *Ogden vs. Jackson*, 1 Johns., 370.

Under the Bankrupt Law, a debtor on the eve of bankruptcy could not transfer goods to a favored creditor in payment of his claim, so as to vest in the creditor any title as against assignees afterward appointed.—3 Wils., 47; *Mayor's Ct.*, 1802, *Waddington vs. Morris*, Liv. Jud. Op., 52.

Even if an act of bankruptcy be contemplated by the debtor, yet if, at the instance and on the application of the creditor, he makes payment or assigns property to him, such payment or assignment is valid as against the assignees of the bankrupt.—*Ct. of Errors*, 1809, *Phoenix vs. Dey*, 5 Johns., 412.

Of the degree of pressure or urgency of solicitation on the part of the creditor necessary to bring the case within this rule. Vide *Ogden vs. Jackson*, 1 Johns., 370; *Phoenix vs. Dey*, 5 *id.*, 412.

A payment of a particular creditor, made after June 1, 1800, but in the hope of being ultimately able to pay all debts. Held, under peculiar circumstances, not fraudulent, as made in contemplation of bankruptcy.—*M'Menomy vs. Ferrers*, 3 Johns., 71. This decision was under the first United States Bankrupt Law of 1800.

An Assignment in bankruptcy under a foreign law passes the personal property within this State of such foreign bankrupt, including debts due him, so that a compulsory payment under such proceedings, by the agent of his debtor, is a defense to the debtor in proceedings here by attaching creditors of the bankrupt. The act of assigning under a Bankrupt Law may be deemed voluntary, within the principle that a voluntary assignment made *bond fide* by a debtor for the payment of his debts is valid, and founded on a valuable consideration, and will operate on his foreign debts, and preclude a subsequent attachment of them.—*Chancery*, 1820, *Holmes vs. Remsen*, 4 Johns., Ch., 460, 485. But see *Holmes vs. Remsen*, 20 Johns., 229; and compare, to the contrary, *Hoyt vs. Thompson*, 5 N. Y., 1 Seld., 320; *Willetts vs. Waite*, 13 How., Pr., 34; *Bird vs. Pierpoint*, 1 Johns., 118.

A trader, whose goods had been seized under an execution, executed a bill of sale of them to the defendant, who paid out the sheriff; the jury found that the object of the transaction was, not

merely to relieve the trader from a forced sale, but to protect the goods from other creditors. Held, that the sale was void under the Statute of 13 Eliz., c. 5, and act of bankruptcy, *Semble*; that it was also void as to persons who became creditors subsequently to the transaction if they were thereby delayed or defrauded.—*Graham vs. Furber*, 25 Eng. Law and Eq., 273.

Property which has been attached, sequestered, or seized on execution by the procurement of the bankrupt *within four months* before the filing of his petition for adjudication in bankruptcy, or by a creditor against him, may be recovered by the assignees from the creditor in whose favor such attachment or execution has been procured. An execution obtained at the suggestion of the bankrupt, and by an act prompted by his own volition, is fraudulent as against his creditors; it uses and abuses the process of the law to give an undue preference to a creditor. It is immaterial whether the debt, in respect of which the attachment or execution procured by the debtor, is for a real or a fictitious debt, 7 *Viner's Abridgment*, 61, and it will be equally an act of bankruptcy whether the debt be a just debt or not. An attachment out of any court for the mere default of the debtor would not be an attachment within the meaning of the act, for such an attachment would not be considered as executed by the debtor's own procurement.—*Deac, Bank*, 63. Where a trader, hearing that a writ of *fi. fa.* was issued against him, clandestinely conveyed his goods out of his house and concealed them privately, in order to prevent them being seized in execution by a *bond fide* creditor of the debtor, this, it was held, though a palpable fraud, was not an act of bankruptcy.—*Cole vs. Davies*, 1 Lord Raymond, 724.

So where, in May, 1842, a tenant in arrear for rent gave, upon the pressing solicitation of the landlord, a warrant of attorney for the arrear and the current year's rent, upon the understanding that judgment was to be entered up thereon, and a *fi. fa.* delivered to the sheriff, but not to be executed till other writs against the tenant should come into the sheriff's hands; and upon such writs coming into his hands in November it was executed. It was held, that the giving of the warrant of attorney was not an act of bankruptcy under this head.—*Gore vs. Lloyd*, 12 M. & W., 463; 13 Law J., N. S., Ex., 366. The arrest, attachment, sequestration, or execution must be proved to have been procured by the bankrupt with intent to defeat or delay his creditors.

The Bankrupt Act of the United States of 1841 contained the same provision as to the procuring by a bankrupt of his goods and chattels to be taken in execution, but the author can find no reported decision in the American courts upon this question. The English authorities are therefore referred to as affording some guide to the proper construction of this provision. In order to establish the fact whether the bankrupt, in order to favor a creditor, has procured his goods to be attached or taken in execution, all the circumstances of the case must be carefully looked to, and any concert or dealing between the bankrupt and the creditor out of

the usual course pursued in cases of hostile execution, should be presented in trying this question.

Executions concerted between the debtor and the creditor to hinder and delay creditors are included in the statute, 13 Eliz., cap. 5, and are held to be void. And where it is found that the creditor has, with the knowledge or at the suggestion of the debtor, hindered or delayed the execution in fraud of the rest of the creditors of the debtor, such acts will afford cogent evidence of the execution having been procured by the debtor in order to confer an undue preference upon the execution creditor.

The author is indebted to the learned and elaborate notes of Messrs. Hare and Wallace, in their edition of Smith's Leading Cases, for the following remarks upon this subject.

In the Circuit Court of the Third Circuit, the distinction is established between a delay by the officer, and a delay by the order or advice of the plaintiff in the execution. The officer, after a levy, need not remove the property nor sell immediately, if the sale be within a reasonable time; but the only legal purpose of an execution is to obtain satisfaction of the debt, and, therefore, if the plaintiff directs the sheriff not to execute it till a certain time, or till further orders, or directs him to levy, and leave the property with the debtor until otherwise directed, this at once renders the execution fraudulent and void against later executions levied before the order not to proceed is countermanded; and the goods remaining in the debtors hands an unreasonable length of time, with the knowledge and assent of the plaintiff in the execution, is legal evidence of the delay being his act.—U. S. vs. Conyngham *et al.*, Wallace's C. C. R., 178, brief note of S. C., without arguments or opinions, in 4 Dallas, 358; Barnes *et al.* vs. Billington *et al.*, 1 Washington, C. C. R., 29, 37; Berry vs. Smith, 3 *id.*, 60. The establishment of this clear and satisfactory principle, which has been adopted in New York and Pennsylvania, and other States, is due to Judge Griffith, of New Jersey, whose opinion in the case of U. S. vs. Conyngham *et al.*, is a fine specimen of the powers of that able lawyer, and highly-accomplished scholar.

In New York the same distinction is established in Rew vs. Barber, 3 Cowen, 272, and Russell vs. Gibbs, 5 *id.*, 390; Ball vs. Shell, 21 Wendell, 222; Knower vs. Barnard, 5 Hill, 877; the Herkimer County Bank vs. Brown, 6 *id.*, 232; and the older cases accord with this distinction, though not expressed to be grounded upon it; the executions being held fraudulent, where the possession or use was left a long time with the debtor by direction of the plaintiff, in Storm & Beekman vs. Woods, 11 Johnson, 110; Farrington & Smith vs. Sinclair, 15 *id.*, 428; and Kellogg vs. Griffin, 17 *id.*, 274; and it being held in Whipple vs. Foot, 2 *id.*, 418, and Doty vs. Turner, 8 *id.*, 20, that mere delay does not avoid the levy, though great delay might authorize the jury to infer the consent and direction of the plaintiff.

In Pennsylvania the law now appears to be precisely the same, though formerly different, or, rather, unsettled. It is evident, in-

deed, from *Levy vs. Wallis*, and *Chancellor vs. Phillips*, 4 Dallas, 167, 213, and other cases referred to in *U. S. vs. Conyngham et al.*, Wallace, C. C. R., 178, that the early decisions in Pennsylvania had fluctuated, because the true principle was not discovered; but upon that principle being stated by Judge Griffith, and more clearly explained by Judge Washington, the decisions in Pennsylvania have ever since been in accordance with it. Merely leaving the property in possession of the debtor is not fraudulent; but an order by the plaintiff in execution to the sheriff to delay proceedings, renders the execution fraudulent against later executions levied during the stay, or against subsequent purchasers, whether the levy be returned or not, and whether or not the later claimant had notice.—*Eberle vs. Mayer*, 1 Rawle, 366; *Commonwealth vs. Stremback and others*, 3 *id.*, 341; *McClure vs. Ege*, 7 Watts, 74; *Metz and another vs. Hanman*, 5 Wharton, 150. The test is, “the presence or the absence of a direction to stay proceedings on the levy. The principle of this test is, that to levy with directions to proceed no farther, can be referred to no object but the creation of a lien, which the law does not tolerate.”—Per Gibson, C. J., in *Hickman vs. Caldwell*, 4 Rawle, 376. And that an order to stay proceedings in case of household furniture will have the same fraudulent effect, is the point decided in *Commonwealth vs. Stremback and others*. An order will have this effect, though there be no fraudulent intent; and of course taking out execution with intent not to have it executed *bond fide*, and it be not so executed, though there be no order to proceed, will postpone the execution.—*Weir vs. Hale*, 3 Watts & Sergeant, 285. A postponement of the sale to any time within the return-day is a mere adjournment, and not fraudulent; but an adjournment to a time beyond the return-day would be equivalent to an indefinite postponement, and a badge of fraud, because no sale could then be made on the writ.—*Sautz vs. Worthington*, 4 Barr., 153, 155. But a delay proceeding from the officer, though by sufferance of the plaintiff, without fraud on his part, will not postpone the plaintiff's execution.—*Howell vs. Atkyn*, 3 Rawle, 282, explained in *Hickman vs. Caldwell*; *McCoy vs. Reed*, 5 Watts, 300. But though the rule in Pennsylvania is, that the officer need not “remove the property, nor put a person in charge, nor sell immediately,” *Commonwealth vs. Stremback and others*, yet it is required that he should do it in a reasonable time, *Wood vs. Vanarsdale*, 4 Rawle, 401; for if the property be left unreasonably long, the delay will afford evidence of the plaintiff's being the fraudulent cause of it, and will, therefore, vitiate the execution, *Corlies & Co. vs. Stanbridge*, 5 Rawle, 286, 290, especially if the levy is not returned.—*Lewis vs. Smith*, 2 Sergeant & Rawle, 142. Household goods can not be left more than a reasonable time, *Cowden vs. Brady and others*, 8 *id.*, 505, 510; as to the reasonable length of time in such cases, see *Commonwealth vs. Stremback and others*, and *Dean and others vs. Patton*, 13 Sergeant & Rawle, 341, 345; and as to what is a reasonable time in general cases, vide Judge Griffith's opinion in *U. S. vs. Conyngham et al.*, Wallace, C. C. R., 29, 37.

In Alabama, also, it is settled that if an execution issued is stayed or held up by direction of the plaintiff, the proceeding is fraudulent in law, and the execution constitutes no lien, as against junior ones regularly levied and enforced.—*Wood vs. Gary et al.*, 4 Ala., 43; *Patton vs. Hayter, Johnson, and Co.*, 15 *id.*, 18, 21.

In Kentucky a similar principle has been adopted: the officer is not obliged to take exclusive possession under a levy on chattels, and therefore the simple retention of the property by the debtor, if it be not continued longer than a vigilant officer may conveniently require to sell the property, is not alone even *prima facie* proof of a fraudulent intent, though it might be some slight evidence of collusion; but a retention of possession, with a right in the debtor to consume or sell the property, or any indefinite holding by the debtor, without any effort by the creditor to sell the property within an ordinary or usual time, is *prima facie* evidence of fraud; and therefore, if there be a continued possession by the debtor for months after the levy, and there be no evidence to rebut the presumption of fraud, the jury will be directed to find that the levy is void against a subsequent execution creditor.—*Swigert, etc., vs. Thomas*, 7 Dana, 220, 222; vide also *Bourne vs. Hocker*, 11 B. Monroe, 25.

In New Jersey the rule in *Berry vs. Smith* is not strictly adopted; mere delay, or an order from the plaintiff not to proceed, will not postpone an execution to a subsequent one.—*Casher vs. Peterson*, 1 Southard, 317; *Williamson vs. Johnson*, 7 Halsted, 86; *Sterling vs. Van Cleve, id.*, 285; *James vs. Burnett, Spencer*, 636, 641. To have that effect, the conduct of the prior execution creditor must be fraudulent; but it is not necessary to prove actual fraud in the concoction of the judgment, or an actual design to defeat or delay other creditors; it is enough if the proceedings of the prior execution creditor are an abuse of the process of the law. Accordingly, it has been determined, that although the creditor when he delivers his execution, or at any time afterward, may direct the sheriff not to proceed to a sale without further orders from him, or unless urged on by other executions, and will not thereby lose his priority if he act in good faith; yet that if the debtor is permitted, with the knowledge and consent of the execution creditor, express or implied, not only to retain the possession of the property, and to use and enjoy it for ordinary and appropriate purposes as in the case of household goods, but to exercise an unlimited control over all the property levied on, whatever may be its nature, and to use, sell, exchange, or consume it, as the rightful and absolute owner, it is such evidence of a fraudulent and colorable use of the process of the court, whether the debt be a real and just one or not, as to postpone the execution to younger ones sued out and prosecuted in good faith.—*Cumberland Bank vs. Hann*, 4 Harrison, 167, 169; *Cook vs. Wood*, 1 *id.*, 254. In Delaware, also, a mere order to the sheriff to hold the execution in his hands, and not proceed unless instructed to do so, or compelled by other judgment creditors, does not postpone an execution.—*Houston vs. Sutton*, 3 Hamington, 37. The practice of allowing executions to be used for the purposes of



a lien is also avowedly established in South Carolina, and dormant executions are never postponed but for actual fraud, *Snipes vs. the Sheriff of Charleston District*, 1 Bay, 295; *Brown vs. Gilliland*, 3 Desaussure, 539; *Greenwood et al. vs. Naylor*, 1 M'Cord, 414; where it is decided that indorsing on a *fi. fa.* "lodged to bind," which was regarded as a stay, did not prevent the execution taking the money made on a younger writ.—*Adair vs. M'Daniel & Cornwell*, 1 Bailey, 158.

In the Eastern States, where an attachment is a usual *mesne process*, it is generally held that possession must be taken and kept, or the property is liable to future attachments.—See *Bagley vs. White*, 4 Pickering, 395, and cases cited; *Taintor vs. Williams*, 7 Connecticut, 271; *Mills vs. Camp*, 14 *id.*, 219; *Harding vs. Janes*, 4 Vermont, 462, 465.

Procuring promissory notes or bills of exchange, to be taken in execution with intent to defeat and delay creditors, is an act of bankruptcy, and the assignees may recover them or their value from the creditor who has thus obtained possession of them.—*Edwards vs. Cooper*, 10 Law J. Q. B., 100.

Where a debtor, in concert with his creditor, has procured his goods to be taken in execution, the fraudulent preference in favor of the creditor is not complete until the goods have been actually seized or levied upon by the sheriff.—*Belcher vs. Gummow*, 9 Q. B., 873.

A fraudulent pledge or transfer of any part of the property of the bankrupt to a creditor who has reasonable cause to believe that his debtor is insolvent, is void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. This provision, which existed in the former United States Bankrupt Act of 1841, and was adopted from the earlier English Bankrupt Acts, removed a great inconsistency that formerly prevailed in the Bankrupt Law; for though a fraudulent gift or transfer by *deed* was held an act of bankruptcy, it had been decided that a sale, or any transfer of goods not by deed, however fraudulent the scheme might be as giving a preference of one creditor to another, and as such void, was nevertheless not an act of bankruptcy.

A fraudulent delivery of goods will not be an act of bankruptcy unless it be in the nature of a gift or transfer; so that where goods are removed with intent to delay a creditor, but the party in whose custody they are placed has no claim given him over them, this is not an act of bankruptcy.—*Cotton vs. James, Moo. & M.*, 273.

A fraudulent delivery of goods by a debtor to one to whom no debt was due, is clearly an act of bankruptcy, and the value of the goods can be recovered by the assignees. So also the fraudulent transfer or delivery of a bill of exchange or promissory note by a trader to a creditor is void, as against the assignees, although the only evidence of the delivery was that it was inclosed in a letter to the creditor, supported by evidence that the creditor would have accepted it.—*Cumming vs. Bailey*, 4 M. & P., 36; 6 Bing., 363.

But where a debtor secretly carried his goods out of his house, and did not place them in the control or custody of any person, this was held not to be a fraudulent transfer of such goods. To render such a transaction void, the parties should stand in the relation of debtor and creditor.

**Evidence of Fraud.**—The section provides that the fact of any sale, assignment, transfer, or conveyance within the third subdivision not being made in the usual and ordinary business of the debtor, is to be deemed *prima facie* evidence of fraud.

**Contracts and Securities made void.**—Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for the order of Discharge of a bankrupt, is made absolutely void by this section.

This provision is adopted from the recent English act consolidating the law of bankruptcy, but this section does not contain the proviso which is found in the English act, viz., that no such security, if a negotiable security, shall be void as against a *bona fide* holder thereof for value, without notice of the consideration for which it was given.

The Bankrupt Act of the United States of 1841 invalidated any security for money given to a creditor in consideration of his withdrawing his dissent, or agreeing not to enter such dissent to the bankrupt's obtaining his certificate. It has been held, that where a security has been given by a third party without the knowledge or privity of the bankrupt to a creditor to induce him to sign the bankrupt's certificate, which at that time was given to a majority in value of the creditors, such a contract was void at common law.—*Ex parte Butt.*, 10 Ves., 359; *ex parte Hall*, 17 Ves., 62.

The contrary, however, has been held in this country: where a friend of a bankrupt, under the act of 1841, without the knowledge or connivance of the bankrupt, arranged with some of the creditors of the bankrupt who opposed his Discharge to give his own notes for their debts as soon as the bankrupt received his Discharge, and take an assignment of their judgments against him, and such creditors thereupon withdrew their opposition, it was held, that notes given in pursuance of that arrangement were valid, and upon a sufficient consideration.—*Bell vs. Leggett*, 2 Sandf., Sup. Ct., 450.

**Penalty upon the Creditor accepting such Security from the Bankrupt.**—Every creditor obtaining any sum of money or security for the purposes before mentioned, either as an inducement to forbear opposition or to consent to the bankrupt's Discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained to be recovered by the assignee for the benefit of the estate.

**BANKRUPT PARTNERS AND CORPORATIONS.**

SECTION 36. *And be it further enacted,* That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partner, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock and property of the copartnership, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of

his separate debts; and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SECTION 37. *And be it further enacted,* That the provisions of this act shall apply to all moneyed, business, or commercial corporations and joint-stock companies, and that upon the petition of any officer of any such corporation or company duly authorized by a vote of a majority of the corporators present at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors; and all the provisions of this act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this act when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint-stock com-

pany, or to any person, or officer, or member thereof: *provided*, that whenever any corporation by proceedings under this act shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporation, in the manner provided in this act in respect to natural persons.

This section, adopting the usual equitable principles which regulated the administration in bankruptcy of partnership property, and prescribed the rights of the joint and separate creditors upon partnership estates in very concise and intelligible terms, lays down the rules upon which, in the event of the bankruptcy of one or more partners, the estate is to be distributed. One member of a partnership firm may become bankrupt upon his own application, or, if he has committed an act of bankruptcy, may be adjudicated a bankrupt compulsorily. The effect of such bankruptcy upon the partnership estate, and the rights of his partner or partners who remain solvent, is clearly prescribed and set forth in the section. In the event of the bankruptcy of all the members in the firm, either upon their own petition or upon a hostile adjudication of bankruptcy by a creditor of the firm, all the joint stock or property of the firm, and also all the separate estate of each partner, is to be taken possession of for the purpose of distributing the assets, subject to the exemptions to which each partner is entitled under Section 14 of this act. Vide notes to that section.

The creditors of the partnership, and the separate creditors of each partner, are then to come in and prove their debts under the estate; the joint creditors upon the joint estate, and the separate creditors of each partner upon the separate estate of such partner. Upon this subject, vide notes to Section 19, title "Partners—Proof of Debts." The creditors of the partnership are to choose the assignees; and this elective right being given to them by the section, a creditor of the separate estate of one of the partners will not have the right to vote in such choice. The assignee is to keep distinct accounts of the joint property of the firm and the separate estate of each partner. The joint estate and property is to bear the whole of the expenses and disbursements of all the proceedings in bankruptcy incurred in the distribution of the estate, and the net proceeds of the partnership property are to be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner are to be appropriated to pay his separate creditors. It frequently happens that the separate estate of one partner of a firm may be more solvent than that of the copartnership, in which event the section provides, that after the payment in full of the separate debts of the partner, any surplus or balance remaining in the hands of the assignee is to be added to the fund for the payment of the joint creditors.

It may happen, on the other hand, that upon the bankruptcy of

a copartnership, that such copartnership is solvent, but that individual members of such partnership may be insolvent with respect to their individual debts and liabilities; and in such an event the section provides that after the payment of the joint creditors of the firm in full, any balance or surplus which may remain in the hands of the assignees shall be divided and appropriated to and among the separate estates of the separate partners according to their respective rights and interests therein, and as it would have been administered if there had been an ordinary dissolution of the partnership, and no bankruptcy had occurred. The sum thus appropriated to the separate estate of each partner is to form the fund out of which his individual creditors are to receive the payment of their dividends.

Joint estate is that in which the partners are jointly interested for the purposes of the partnership at the time of the bankruptcy.

Separate estate is that in which the partners are each separately interested at the time of the bankruptcy. It is not unusual to confine the term "separate estate" to that part of the partner's property which is unconnected with the partnership. But it may be applied to property used for the purposes of a partnership, if belonging to one or more partners to the exclusion of the rest.—*Ex parte Hamper*, 17 Ves., 404; Coll. on Part., 595, 596, 2d ed.

Separate debts are those for which the creditor has a remedy at law against such partner only of the firm as contracted them. Joint debts are those which can be recovered by action, in which all the partners constituting the firm must be defendants.

A B, in consideration of one per cent., guaranteed to C D and Sons the payment of one half of the price of certain bales of wool purchased by W and E, who had given their acceptance at eight months for the full amount to C D and Sons. W and E and A B severally became bankrupt. A B had not obtained his certificate, and no dividend had been declared when the bill was dishonored. A proof by C D against the estate of A B for the amount guaranteed was tendered before the commissioner and refused, but on appeal was allowed.—*Ex parte Brook*, 12 Jur., 411; 17 L. J. Bank., 8.

A and B were partners. B, to obtain capital for the business, borrowed money, and for security entered into a bond, in which C and D became his securities for the repayment of the money and interest, and also effected and deposited with the lenders a policy of insurance on his life. One of the conditions of the bond was, that the money should be repayable on either B, C, or D becoming bankrupt. The two partners entered into a deed of covenant to indemnify C and D, the sureties, from all loss by reason of their entering into the bond. A and B became bankrupt, and C and D were called on for payment of the whole money, which C paid, together with interest and expenses. Held, that C was not entitled to prove for the money as a creditor on the joint estate.—*Ex parte Meyer*, 12 Jur., 447.

A, B, and C, who were in partnership, were joint owners of a ship with D, the managing owner, who contracted a debt with the petitioners for goods supplied for the use of the ship. A, B, and C

became bankrupt. Held, that the petitioners could not prove against their joint estate, but only against the separate estate of each of the bankrupts.—*Ex parte* Benson, 2 Mont., D. & D., 750.

A and B dissolved their partnership, when B assigned all the joint property to A, among which were debts due to the firm to the amount of £60, but no notice of assignment was given to the debtors. A and B severally became bankrupt. Held, that a joint creditor, who had proved under the separate estate against A, was entitled to receive dividends on his proof.—*Ex parte* Taylor, 2 Mont., D. & D., 753.

A trader made a promissory note as a surety for a debt due to one of the creditors of a firm. The firm and the trader became bankrupt, and the creditor proved against the estate of the trader on the note, and against the separate estate of a partner in the firm on the debt. A dividend was declared and paid on the former proof, but not on the latter. Held, that the assignees of the trader were not entitled to an order to prove against the joint estate of the firm for the amount of the dividend which they had paid on the promissory note.—*Ex parte* Brown, 2 Mont., D. & D., 718; 6 Jur., 1021.

Where, upon the dissolution of partnership, the debt of the retiring partner was ascertained upon the supposition that all the joint debts were paid, and the retiring partner assigned his share of the partnership assets, upon an agreement that he should pay the continuing partners his balance, and that the continuing partners should pay the outstanding debts of the firm, and afterward the continuing partners became bankrupt; the liability of the retiring partner to pay an outstanding debt of the original partnership was held not to be a debt of mutual credit, so as to enable him to set it off against the claim of the assignees for his ascertained balance under the agreement.—*Abbott vs. Hicks*, 5 Bing., N. C., 579.

The defendant was sued on a debt due from him as a surviving partner, and one due from him in his private capacity. He pleaded that he, residing in New Hampshire, applied to the District Court there for the benefit of the Bankrupt Act in his private right and capacity as a partner. And he also, in another plea to the court on the private debt, pleaded that he applied for the benefit of the Bankrupt Act and was discharged, nothing of the partnership being said. On demurrer to the rejoinder it was held, that the plea was good, though it did not state that the defendant was decreed a bankrupt as partner, or that his partner was also decreed a bankrupt; that as the court was shown to have had jurisdiction, and to have decreed his Discharge, it would be presumed that all the intermediate steps were regularly taken; that to state the legal effects of the decree pleaded was sufficient; and that the replication, which stated, that before the defendant made his application, his partner, residing in another district, applied there for the benefit of the Bankrupt Act as a partner, and thereupon the court declared him a bankrupt, and appointed an assignee, did not avoid the plea.—*Morrison vs. Woolson*, 3 Foster, N. H., 11.

D and Y carried on business in Liverpool in partnership as D, Y, and Co. D, Y, and Y also carried on business in Pernambuco in partnership as D, Y, and Co. The two firms were separate and distinct, and the third partner in the Pernambuco trade had not any interest in the Liverpool business. The Pernambuco house drew bills upon, and they were accepted by the Liverpool house *bond fide* and in the ordinary course of business, and two of such bills came into the hands of G and K honestly, in the due course of trade. The English firm became bankrupts, and afterward the Pernambuco firm entered into a *concordata* with their creditors, under which they vested property in trustees for the benefit of their creditors. G and K received a dividend under the *concordata* out of the assets vested in the trustees of the Pernambuco firm as drawers of the bill. They subsequently attempted to prove against the Liverpool firm as acceptors of the bills, but one of the commissioners decided, that there was no right to double proof, and upon appeal the same was affirmed, Lord Justice Turner agreeing with the commissioner, Lord Justice Knight dissenting.—*Ex parte Goldsmid*, 39 Eng. Law and Eq., 106.

The members of a partnership became in 1847 unable to meet their engagements; a deed of arrangement was drawn up between themselves and most of their creditors, to which deed the plaintiffs were not parties, nor was it executed by them, by which provisions were made for paying the debts of the partnership, and they were in virtue thereof released from further liability. Held, that this deed, having been completely executed before the passing of the 12 & 13 Vict., ch. 106, the Bankrupt Law Consolidation Act, did not fall within the provisions of the 224th Section of that statute, and, consequently, could not bind strangers to it, and, therefore, could not be pleaded in bar to an action brought against the partners by the plaintiffs, who were creditors at the time of the execution of the deed, but had never executed it.—*Larpent vs. Bibby*, 34 Eng. Law and Eq., 7.

Where there was joint estate to the amount of £13, it was held, that the joint creditors could not receive dividends from the separate estate until all the separate creditors could be paid in full, although it did not appear that after costs any amount of the £13 would remain for distribution.—*Ex parte Kennedy*, 19 Eng. Law and Eq., 150.

Where one or more of several partners have been declared bankrupts and discharged under the act, a suit can not be maintained in the name of the several partners on a note owned by the firm before such bankruptcy.—*Tims vs. Ross*, 81 S. & M., 557. Decided under the United States Bankrupt Act of 1841.

Where three firms, having each a distinct name, keeping separate books and doing a separate business, consist of the same persons, and upon the bankruptcy of one firm its claim against one of the others, also bankrupt, is sold by the assignee, and by the purchaser proved against the debtor firm, he can not afterward proceed by suit for the debt against either of the partners; for, although the



three firms may be regarded as distinct so far as to settle the claims of the creditors of each, and to render a debt due from one firm to another assets for the creditors of the latter, yet there could, in fact, be no debt that could pass to a purchaser to make him a creditor of the debtor firm, since all were bankrupt.—*Buckner vs. Calcote*, 28 Miss., 2 Cush., 432.

The assignees of one partner, under a separate commission, are tenants in common with the solvent partner, and one can not call the joint property out of the other's hands.—*Murray vs. Murray*, 5 Johns., Ch., 60.

A decree of the United States District Court, admitting the proof of the debt in such a case, is conclusive as to the matter before it, but does not settle the question as to the rights of parties acquired under that decree that are drawn in question here.—*Buckner vs. Calcote*, 28 Miss., 2 Cush., 432.

The assignee of one partner who is bankrupt must join with the solvent partner in a suit at law.—*Murray vs. Murray*, 5 Johns., Ch., 60.

The assignees of a bankrupt partner brought a suit in equity to recover partnership property, to which the solvent partner, who was made party to the suit, demurred, on the ground that the assignees of one partner were not entitled to recover joint property. The demurrer was overruled, and an account was, with consent of parties, taken before the master, and finally settled. Held, that the solvent partner could not, in a collateral suit, question the right of the assignees to the property so recovered, though the decree, in the suit by the assignees, reserved to the solvent partner a right to question their claim.—*Murray vs. Murray*, 5 Johns., C. R., 60.

A solvent partner can not call upon the assignees of a bankrupt copartner, or partnership debtors who have *bond fide* settled with the assignees, to account for the partnership property, in order to get possession of the property for the purpose of distribution among the partnership creditors. The right of the assignees to distribute the fund is equal to his at law, and superior to it in equity. Vide case last cited.

Where a joint fiat issued against A and B, who were partners, and the debt was separate, it was held void, and the subsequent superseding it as to A could not make it good as a separate fiat as to B.—*Ex parte Clarke*, 1 Deac. & Chit., 544.

Four partners were adjudicated bankrupts, two of whom resided abroad. The adjudication was made on the 8th of November. On the 13th notice was given of an application, on behalf of the partners abroad, to suspend the advertisement. On the 17th the meeting was held to show cause against the issue of the advertisement, and the application was then made. The commissioner refused to suspend the issue of the advertisement on the ground that, as the application was not made within seven days from the adjudication, he had no authority, under the 104th Section of the 12 & 13 Vict., c. 106, to do so. Held, upon appeal, that "such extended time" mentioned in the section meant "further or longer time" not ex-

ceeding fourteen days; and that the notice having been given within the seven days, every thing was *in fieri*, and the commissioner had authority to grant the application. The matter was therefore sent back to the commissioner.—*In re Castelli*, 8 Eng. Law and Eq. Rep., 280.

Where one of several partners becomes a bankrupt, the action must be brought in the name of the solvent partner and the assignees of the bankrupt.—*Thompson vs. Frere*, 10 East., 418; recognized by *Baily, B.*, in *Burt. vs. Mould*, 3 Tyrw., 569.

If one partner becomes a bankrupt, his assignee can not obtain any share of the partnership effects until they satisfy all that is due from him to the partnership.—*Holderness vs. Shakels*, 8 B. & C., 618; per *Tenterden, C. J.* A solvent partner may sue out a writ in the name of his partner or of his assignees, if he be bankrupt, as well as his own, in order to recover a debt due to the partnership; but the partner who objects has a right to be indemnified against the costs.—*Whitehead vs. Hughes*, 2 Cr. & M., 318.

Although each partner may bind the others by dealing with strangers in the name of the firm, yet he can not do so on his own individual account to a larger extent than his interest. Thus, though the goods may be taken, and his share therein sold for his own private debt, yet the purchaser from the sheriff buys only that to which the defendant is justly entitled, as between himself and his companions.—*Heyden vs. Heyden*, 3 Salk., 392; *Chapman vs. Koops*, 3 B. & P., 289; *Johnson vs. Evans*, 7 Mann. & G., 240. So if he became individually a bankrupt.—*Holderness vs. Shakels*, 8 B. C., 612; *West vs. Skip*, 1 Ves., 242.

In the case of voluntary bankruptcy upon the application of an individual partner, or the copartnership upon their own petition, no difficulty can of course arise; but where a creditor attempts to make a partnership firm bankrupts, and files a petition for adjudication in bankruptcy against them *jointly*, he must establish a joint debt due from the copartnership to him, in its nature provable under this act, to an amount of at least two hundred and fifty dollars; he must also establish that the copartnership has committed one of the acts of bankruptcy specified in Section 39. Such an act of bankruptcy may have been committed by the partnership jointly, by executing a deed or making an assignment, or making a transfer, pledge, payment, or delivery of goods which may amount to a fraudulent preference, or in fact that the copartnership have jointly been concerned or participated in the commission of some act which is constituted by the section above alluded to an act of bankruptcy.

If there be no evidence of such joint act of bankruptcy committed by the firm, the creditor may prove an individual act of bankruptcy committed by each member of the firm; and in the event of his being unable to establish either of these two propositions, he can only make such member of a copartnership bankrupt who may have committed some act of bankruptcy.

One member of a copartnership is not liable to be made a bankrupt in respect of an act of bankruptcy committed by another mem-

ber of a copartnership unknown to him, and without his sanction, direction, authority, or ratification.

In some cases where there are partners, it has been held that the act of one partner with respect to the commission of an act of bankruptcy, is binding upon all the others; but these decisions have proceeded on the principle that the party committed the act of bankruptcy under such circumstances, and in such connection with the usual trade and dealings of the firm, that it must be presumed he had authority to bind the firm by his acts. An assignment by a partner conveying any portion of the partnership property in fraud, and without the knowledge of his copartner, if it amounted to an act of bankruptcy, would clearly not bind the innocent partners.

Where one of three partners carrying on a bank in England, and who had the sole management of the business, his copartners residing at a distance, absented himself from the banking-house, shut it up, and stopped payment, which acts constituted an act of bankruptcy by the English Bankrupt Law, it was held, that this was no evidence to support a joint adjudication in bankruptcy against the firm.

These cases must depend very much upon their own peculiar circumstances. A partner can not stand by and, with a knowledge that his copartner is dealing with the partnership property by giving preferences and engaging in transactions which render such partner amenable to the Bankrupt Law, escape the consequences of his copartner's acts; while, on the other hand, it would be manifestly unjust to subject a partner to the consequences of bankruptcy for an act done by his copartner of which he had no knowledge, and to which he neither directly nor indirectly consented. If the firm were known to be in insolvent circumstances, and were dealing with their property in a manner out of the usual and ordinary course of business, such facts would afford cogent proof to bind all the partners for the acts of the individual partner who committed an act of bankruptcy.

Upon the question of a compulsory adjudication of bankruptcy against a firm these facts are minutely examined, and the court is to be satisfied that the partners concurred with, or were cognizant without objection, of the act of bankruptcy imputed to the individual partner.

The question of the liability of one partner to be made a bankrupt by the act of another is one of paramount importance in every commercial community. After an accurate search, no reported decision can be found upon this question in the American courts in the construction of either of the former United States Bankrupt Acts, and it is questionable whether the point has ever arisen, or has ever received any judicial determination in this country. The only analogy which can be found must be drawn from cases upon the authority of one partner to bind his copartner by the execution of deeds of assignment of partnership property in trust for creditors; and although there exists some conflict in the decisions of the various cases, the result clearly appears to be that one partner can

not bind his copartner by the execution of a fraudulent deed, or the making of a fraudulent preference by assignment or conveyance.

One partner can not make an assignment of the partnership property for the benefit of the firm's creditors without the consent of the other partners, where they are present, and actually engaged in the business of the partnership—*Deming vs. Colt*, 3 Sandf., Sup. Ct., 284.

Where one partner, in the absence of his copartner, executed a bill of sale, under seal, of all the partnership effects, the sale being *bona fide* and for the full value of the property, and made to pay a pressing debt of the absent partner, it was held, that the sale was binding upon the absent partner, and passed the whole title of the firm to the property.—*Forkner vs. Stuart*, 6 Gratt., 197.

Where one partner agreed with a private creditor, that if he would trade with the firm, his account should go in payment of his private debt, and it did not appear that the other party approved of the same, it was held, that such agreement could not be sustained so as to diminish the partnership assets.—*Ramey vs. M'Bride*, 4 Strobb., 12.

One partner can not, without the consent of the other, appropriate the partnership property to his individual purposes.—*Bourne vs. Wooldridge*, 10 B. Mon., 492.

One of a firm of warehousemen falsely represented to a person who advanced money on the faith of such representation, that the one to whom the money was advanced, and to whom he had given receipts in the firm name, had on storage with the firm a certain quantity of grain. The innocent partners were held bound by the representation, and responsible for the money advanced.—*Griswold vs. Haven*, 25 N. Y., 11 Smith, 595.

In the absence of fraud, one member of a firm may, notwithstanding the protest of his partner, transfer all the property of the partnership, in consideration of the promise of the purchaser to pay its debts, though not yet due.—*Graser vs. Stellwagen*, 25 N. Y., 11 Smith, 315. (Sutherland, Allen, and Smith, J. J., dissenting.)

Each partner has full power to sell, pledge, or otherwise dispose of the entirety of any particular effects belonging to the partnership, and not merely of his own share thereof, for any purpose within the scope of the firm secured by any joint contract, but he can not affect the rights of his copartner in any several contract.—*Clark vs. Rives*, 33 Miss., 579.

Each partner possesses an equal and general power in behalf of the firm to pledge, exchange, or otherwise dispose of the partnership effects for any and all purposes within the scope of the partnership. One partner may assign property for the benefit of one of several, or of all joint creditors. Whether one partner can make a general assignment of all the partnership effects, *quære* *Cullum vs. Bloodgood*, 15 Ala., 34.

One partner can not, without the consent of his copartner, appropriate the assets of the firm to the payment of his individual debts; and such appropriation, if made with a knowledge on the

part of the person receiving them that they are the joint property of the firm, is no bar to an action instituted against him by the partnership.—*Burwell vs. Springfield*, 15 Ala., 273.

One partner can not bind the firm by deed without special authority; and if he executes a single bill under seal in the name of the firm without such authority, it binds himself alone.—*Morris vs. Jones*, 4 Haring, 428.

Whether one partner can, during the existence of the partnership, assign the partnership effects in the name of the firm for the payment of the partnership debts, giving some a preference over others, *quære* *Walworth, Ch.*, *Egberts vs. Wood*, 3 Paige, C. R., 517.

Although one partner, on the eve of insolvency, or after it exists, may pay a debt of the firm in money or property, and although one partner may assign to a trustee for the equal benefit of all the creditors, yet he can not make an assignment which shall prefer any of the creditors.—*Hitchcock vs. St. John*, 1 Hoff, C. R., 511.

Where an assignment by such acting partner purported to be an assignment of his individual property for the benefit of his individual creditors, in classes specified, and the property conveyed included both individual and partnership property, and the creditors to be paid included both individual and copartnership creditors, it was held, that though no distinction was made in the deed between his joint and separate property, yet the deed was not fraudulent in fact or law, the debts provided for being just, and that equity would reform the deed, so that the joint property should be applied to the payment of the partnership debts, and the separate property to that of the assignor's separate debts, and according to the order of preference established in the assignment.—*McCullough vs. Somerville*, 8 Leigh, 415.

Instruments under seal executed by one partner in the absence of the other partners, in those cases where binding on a firm, are binding in transactions only that transfer an interest.—*McDonald vs. Eggleston*, 26 Vt., 3 Deane, 154.

A, one of a firm consisting of A, B, and C, sold out his interest in the firm to D. Afterward B and C assigned to the defendants all their rights and interest "as members of the firm," in all effects of the firm, in trust for creditors, providing that the partnership property should be applied to the payment of partnership debts. Held, that this was an assignment by two partners of all the partnership effects for the benefit of creditors, and that the whole title of those effects passed by such assignment.—*Clark vs. Wilson*, 19 Penn., 7 Harris, 414.

One partner can not by his individual act bind the firm as the guarantor of the debt of another, or as a party to a note or bill made for the accommodation or as the surety of another, without authority specially given him for the purpose, or implied from the common course of business of the firm, or from the previous course of dealings between the parties, unless the act of such partner be afterward ratified by the others.—*Sweetser vs. French*, 2 Cush., 309.

An assignment made by one partner against the known wishes of his copartner, conveying the partnership effects to a trustee for the benefit of creditors, and giving preferences, is invalid. The principle on which an assignment by one partner in payment of a partnership debt is sustained, is that there is an implied authority for that purpose, the payment of firm debts being a part of the necessary business of the firm. But it is no part of the ordinary business of a copartnership to appoint a trustee of all the effects for the purpose of distributing them among creditors. — *Chancery, 1834, Havens vs. Hussey, 5 Paige, 30. Vide also Mills vs. Argall, 6 id., 577.*

The reason why a general assignment of the firm effects made by one partner only is held invalid, is not that it operates as a fraud on the other partner, but because the relation of partner does not confer power upon any one partner to make it. Where the assignment is made after insolvency, and divides the funds equally among creditors, it will be supported; for the partner making it might, by filing a bill, insure an equal distribution, and, in the absence of any dissent by the copartner, his assent to such distribution may be presumed. But an assignment by one partner giving preferences, will be deemed invalid. — *A. V. Chancery Ct., 1840, Hitchcock vs. St. John, Hoffman, 511.*

The relation subsisting between partners is of the most intimate and confidential nature. They are joint tenants of the stock and effects of the company, their interests are joint and mutual, and each is seized *per my et per tout*; each has entire possession, as well of every part as of the whole, and not the undivided whole as a moiety. A partnership is a voluntary association, by which, in all the affairs connected with the business, an authority is impliedly given to every member to dispose of the partnership property as if it were his own personal effects. Such is the indivisible nature of their interest and the capacity of every member to act as the authorized agent of all, that whatever one does in the course of the partnership business, has the same efficacy as if all had severally and directly joined in the act. — *Ct. of Appeals, 1855, Mabbett vs. White, 12 N. Y., 2 Kern, 442.*

A partner has not power, as such, to assign the assets of the firm to a trustee for the benefit of creditors. To support such an assignment by one partner, or any number short of the whole, it must be shown that it was made under circumstances that rendered it impossible to consult the other partners, or from their acts or declarations, either before or subsequent thereto, that it was executed by their assent or by their authority. — *N. Y. Common Pleas, 1852, Fisher vs. Murray, 1 E. D., Smith, 341.*

By the law, a merchant, although the effects of a copartnership, upon the insolvency of the firm, were in equity considered a trust fund for the payment of the partnership debts, and any of the partners might apply to have them appropriated ratably among all the creditors, yet either of the partners before a dissolution, or all of them afterward, might appropriate them to the payment of one cred-

itor in preference to another. The Revised Statutes have imposed a partial restriction on this right by depriving an insolvent debtor who attempts to exercise it of the benefit of the insolvent laws. But if he is willing to subject himself to this disability, the payment of one creditor, to the exclusion of others, is valid as against the others. And the surviving partners, upon a dissolution of the firm by death, may give a similar preference, with the consent of the personal representative of the decedent.—*Chancery, 1832, Egberts vs. Wood, 3 Paige, 517.*

One partner has authority, in the absence of fraud, to sell and transfer all the copartnership effects directly to a creditor of the firm, in payment of a debt, without the knowledge or consent of his copartner, although the latter is at the place of business of the firm and might be consulted. Nor is such transfer invalid although the firm is insolvent, and thereby the one creditor gains a preference over the other creditors of the firm.—*Ct. of Appeals, 1855, Mabbett vs. White, 12 N. Y., 2 Kern., 242.*

When a partnership formed, not for the purpose of buying and selling, but for a business in which the continued ownership of the partnership property is indispensable, has closed, or is about closing, neither of the partners can make an assignment or sale of the joint property, even for the payment of creditors, when the other is present and capable of acting in the matter, without his consent; and, in such a case, mere knowledge of the intended sale will not be sufficient evidence of assent.—*Sloan vs. Moore, 37 Penn. State R., 217.*

An assignment by one copartner of the whole copartnership property to a trustee for the benefit of the creditors of the firm, with preferences, without the knowledge and assent of the other copartner, who is present and capable of attending to the common business, is void, as beyond the power of one member only of a copartnership. A subsequent bill of sale of a portion of the firm property to the assignee, who was a creditor of the firm, in payment of, or as security for his debt, was held good, although executed by one of the copartners without the knowledge or assent of the other, as within the competence of one member only of the firm.—*Ormsbee vs. Davis, 5 R. T., 442.*

An assignment in trust of partnership property by one partner in the absence of his copartner is not void *per se*, but only voidable by such copartner.—*Sheldon vs. Smith, 28 Barb., N. Y., 593.* A ratification by the copartner on his return makes such assignment valid from its execution. An assignment so ratified becomes absolute as against the partner first making it, and he can not alter its terms, nor make a note to the creditor, dating it prior to the assignment.

It is not competent for one member of a partnership, without the assent or concurrence of his copartner, being present or capable of acting, to make a general assignment of the property and effects of the firm to a trustee for the payment of the partnership debts, even though no preferences are directed. The power to make such a

disposal of the effects is not implied in the partnership relation.—N. Y. Superior Ct., 1849, *Deming vs. Colt*, 3 Sandf., 284, S. P.; Supreme Ct., Sp. T., 1857, *Haggerty vs. Granger*, 15 How., Pr., 243; N. Y. Com. Pl., 1858, *Wetter vs. Schlieper*, 6 Abbott's Pr., 123.

If upon his return the absent partner affirms and ratifies an assignment executed during his absence by his partner in his name and as his attorney, such ratification will relate back to the time of the original execution of the instrument, and render the assignment valid and operative from that time.—5 Hill, 107; Story on Ag., § 239, 244.

One partner has no authority to make an assignment of the partnership assets to a trustee for the benefit of the creditors, though without giving any preferences, except with the assent or concurrence of the other partners.—*Wetter vs. Schlieper*, 4 E. D., Smith, N. Y., 707.

One partner has authority to make an assignment under seal of all his goods, notes, and accounts of the firm to a trustee for the benefit of creditors. The assignment is not void because the debts of the individual partner were included therein, but only the partner's surplus, after satisfying the partnership debts, could be applied to the payment of his debts.—*Lasell vs. Tucker*, 5 Sneed, Tenn., 33.

Two out of four persons in partnership, the other two being at the time out of the State, have no authority, without the assent of such partners to make an assignment of the firm property for the benefit of creditors, giving a preference to some over others, and the insolvency of the firm will not give them any such authority.—*Petee vs. Orser*, 6 Bosw., N. Y., 123. Such an assignment will be void as against creditors and the sheriff levying in their behalf.

The assignee in such case being one of the preferred creditors, can not retain any advantage in the assigned property over the other creditors, on the ground that as to him there is a particular application of his share of the funds to the payment of his debt. Vide same case.

One partner sold his interest in the firm to his two copartners, and left them in possession of the property. Held, that they had a right to pass the whole title by assigning the same for the purpose of paying the partnership debts.—*Clark vs. McClelland*, 2 Grant's Cases, Penn., 31.

It was doubted whether one partner has the right to assign copartnership effects to a trustee for the payment of debts, giving preferences, without the assent of the other partner.—*McClelland vs. Remsen*, 36 Barb., N. Y., 622.

One partner has power to sell the copartnership effects to a particular creditor for payment of his debt; also, to dispose of the property of the firm by assignments as security for antecedent debts, as well as for debts to be thereafter contracted on account of the firm. Vide case last cited.

A sale by a partner to secure antecedent debts to a firm creditor is not invalidated by the fact that the other partner, though pres-



ent, was not consulted; neither by the insolvency of the firm at the time, and the preference which the purchasing creditor obtains over others. *Vide* same case.

A partner mortgaged his private property for a firm debt, and on that mortgage the property was sold and debt satisfied, after the firm assets had gone into the hands of an assignee for creditors. Held, that the separate estate of the partner stood on the same footing as other general creditors of the firm.—*Kendall vs. Rider*, 35 Barb., N. Y., 100.

A partner may commit an act of bankruptcy by making a fraudulent assignment or fraudulent conveyance to his copartner; but that will not amount to an act of bankruptcy by the partner who receives such fraudulent assignment.—*Whitwell vs. Thompson*, 1 Esp., 68.

No adverse adjudication of bankruptcy can issue against the members of a copartnership jointly, unless the creditor petitioning for such adjudication prove the joint indebtedness of the firm to the amount required by the act. And the debt must be such a one as, if payable, an action at law could be maintained against all the members of the firm.

In the course of the proceedings to obtain adjudication of bankruptcy against all the members of the firm, it frequently occurs that the creditor looks to the liability of one of the members of the firm, who is sometimes known to be solvent, for the payment of his debt, and, before he can obtain adjudication against the desired partner, he must, as before observed, establish a *joint* liability.

Partnership is either actual or nominal. Actual partnership takes place when two or more persons agree to combine property, or labor, or both, in a common undertaking, sharing profit and loss. "I have always," says Tindal, C. J., in *Green vs. Beesley*, 2 Bing., N. C., 112, "understood the definition of partnership to be mutual participation in profit and loss." But with respect to third persons, an actual partnership may subsist where there is a participation in the profits, even though the participant may have most expressly stipulated against the usual incidents to that relation.—*Bromley vs. Elliott*, 38 New Hampshire, 287, 302; *Sheridan vs. Medara*, 2 Stockton, 469; *Wood vs. Valette*, 7 Ohio, N. S., 172; *Smith vs. Hallester*, 32 Vermont, 695, 704; *Hazzard vs. Hazzard*, 1 Story, 371, 374; see *Bond vs. Pittard*, 3 M. & W., 357. Such stipulation will indeed hold good between himself and his companions, but will in nowise diminish his liability to third persons, and this is founded on a principle of justice to the community; for, to use the language of the chief justice in the principal case, by taking part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.—See *Cheap vs. Cramond*, 4 B. & Ad., 663; *ex parte Wheeler*, Buck, 48; *Hoare vs. Dawes*, Douglass, 371. Nor does it signify whether he receive them for his own benefit or as trustee for others, since the mischief to the creditors would be the same if he were to be exempt from liability in either case.—*Wightman vs. Townore*, 1 M. & S., 412; *Wheatcroft vs.*

Hickman, 9 C. B., N. S., 100. Equally indifferent is it whether his share be large or small.—Rex vs. Dodd, 9 East., 527. In holding one who has placed money in the firm and is to receive part of the profits, liable, viz., that he would otherwise receive usurious interest without risk, this reason, at no time a very satisfactory one, nor at all necessary to sustain the proposition for which it was adduced, is now taken away in the majority of cases by the operation of the act for the abolition of the usury laws.—17 & 18 Vict., c. 90.

There may be a participation in profits, yet no partnership, even *quoad* third persons. The real test of the liability of a person to third parties as a partner is, whether or not the other person or persons conducting the business were his agents to carry it on. This appears to be decided by the unanimous judgment of the House of Lords in *Wheatcroft vs. Hickman*, and another, 9 C. B., N. S., 47, 8 H. of Lords, cases, 268; 30 L. J. C. P., 125, S. C., overruling the previous dicta to the contrary, and reversing the decision on the same case of the Common Pleas and of the Exchequer Chamber, in which latter court, however, the judges were divided in opinion, as also were the judges who delivered their opinions in the House of Lords. The facts of the case were these: Messrs. Smith, who were partners, as iron merchants, at the Stanton Iron Works, became insolvent, and a deed of arrangement was executed between them and their creditors. By this deed Messrs. Smith conveyed all their property to five trustees upon trust, to continue and carry on, under the name and style of the Stanton Iron Company, the business theretofore carried on by the Messrs. Smith in copartnership. The deed then conferred upon the trustees powers to manage the works as they thought fit, and to renew leases, insure, erect buildings and machinery, appoint managers and agents, enter into and execute all contracts and instruments in carrying on the business (a provision clearly authorizing the trustees to make or accept bills of exchange), and to divide the net income of the business remaining, after the above purposes had been answered, among the creditors of Messrs. Smith, in ratable proportions, provided that, in distributing such income, it should be deemed the property of Messrs. Smith, with power for the majority in value of the joint creditors, at a meeting, to alter the trusts, and make rules as to the discontinuance of the business and the management of it, and ultimately, after paying the debts incurred in the business so carried on, to divide the residue of the moneys ratably among the creditors, with the same provision that the moneys were to be considered the property of Messrs. Smith. The creditors were to receive the provisions of the deed in full discharge of their debts, and they covenanted not to sue. The defendants were creditors of Messrs. Smith, and they subscribed and executed this deed. The trustees carried on the business in pursuance of the deed, under the name of the Stanton Iron Company, and the plaintiff having supplied the company with iron ore, one of the trustees accepted bills of exchange in the name of the company for the price of it. The bills not having been paid at maturity, the plaintiffs sued the de-

defendants as acceptors. The real question was, whether the deed made the defendants partners with the trustees, or what is the same thing, agents to bind by their acceptances on account of the business, and the lords present (Lords Campbell, C., Brougham, Cranworth, Wensleydale, and Chelmsford) unanimously held that such agency was not established by the deed, and that the defendants were not liable. "It is often," observed Lord Cranworth, "said, that the tests, or one of the tests, whether a person not ostensibly a partner is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to the profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say, that the same thing that entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, *i. e.*, that he stood in the relation of principal toward the person acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow, that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor or trustees." His lordship then proceeded to show that *Waugh vs. Carver*, *Bond vs. Pittard*, and *Barry vs. Nesham*, applying to them the test enunciated by him, were correctly decided. "The law," said Lord Wensleydale, "as to partnership, is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view. A man who orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent; and the principal is liable for the agent's contracts in the course of his employment."

So, if two or more agree that they should carry on a trade and share the profits, each is a principal, and each is an agent for the other; and each is bound by the other's contracts in carrying on the trade as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract, by virtue of the agreement made at the

time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who takes the profits ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, and not the cause, why a man is made liable as a partner. Can we collect from the trust deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed constitutes them his agent for carrying on the business for his account and the rest of the creditors? I think not. It is true that, by this deed, the creditors will gain an advantage by the trustees carrying on the trade, for if it is profitable they will get their debts paid; but this is not that sharing of profits which constitutes the relation of principal, agent, and partner."

On the above principles it is, that a dormant partner, *i. e.*, a partner whose name does not appear to the world as part of the firm, is held responsible for its engagement, even to those who, when they contracted with the firm, were ignorant of his existence.—*Ex parte Gellar*, Rose, 297; *Wintle vs. Crowther*, 1 C. & P., 316; 1 Tyrw., 210; *Robinson vs. Wilkinson* 3 Price, 598; *Bottomley vs. Nuttall*, 5 C. B., N. S., 122; *Bromley vs. Elliott*, 38 N. H., 287, 302; *Pierson vs. Steinmeyer*, 4 Richardson, 309. In one respect, however, there exists very considerable difference between the liabilities of an ostensible partner and those of a dormant one; for the liability of a partner who has appeared in the firm, in respect of the acts and contracts of his copartners, continues even after the dissolution of the partnership, and the removal of his name therefrom, until due notice has been given of such dissolution.—*Martin vs. Searles*, 28 Conn., 43; *The City Bank vs. M'Chesney*, 20 N. Y., 240. See *Parkin vs. Carruthers*, 3 Esp., 248; *Graham vs. Hope*, Peak., 154. And though, as far as the public at large are concerned, notice in the Gazette is held sufficient for this purpose, *Godfrey vs. Turnbull*, 1 Esp., 371; *Wrightson vs. Pullan*, 1 Stark., 375; *Brodie vs. Howard*, 17 C. B., 123, per Willes, J.; *Martin vs. Searles*; or any publication of the fact which will render it generally notorious, to persons who have dealt with the firm more specific information must be given.—*Kirwan vs. Kirwan*, 4 Tyrw., 491; *Page vs. Brant*, 18 Illinois, 37; *Clapp vs. Rogers*, 1 E. D., Smith; *Lyon vs. Johnson*, 28 Conn., 149; *The Mechanics' Bank vs. Livingston*, 33 Barb., 458; *Little vs. Clark*, 12 Casey, 314; *Williamson vs. Fox*, 2 Wright, 214; *Grady vs. Robinson*, 28 Alabama, 289; *Skannell vs. Taylor*, 12 Louisiana, Ann., 773; see *The Bank vs. M'Chesney*. And this is generally effected by circulars; see *Neusome vs. Coles*, 2 Camp., 617; *Jenkins vs. Blizard*, 1 Stark., 418. But if a fair presumption of actual notice can be raised from other circumstances, that will be sufficient.—*M'Iver vs. Humble*, 16 East., 169; *Lyon vs. Johnson*, *Little vs. Clark*, *Dedford vs. Reynolds*, 12 Casey, 325; *Park vs. Wooten*, 35 Alabama, 242. Thus a change in the wording of checks has been held notice to a party using them, *Barfoot vs. Goodall*, 3 Camp., 147; see *Green vs. The Merchants' Ins. Co.*, 10 Pick., 402; *Boyd vs. M'Cann*, 10 Maryland, 118; *Page vs. Brant*, 18 Illinois, 37;

*Treadwell vs. Wels*, 4 California, 260, which tend to sustain, and *Beltzhoover vs. Blackstock*, 3 Watts, 20, which negatives the idea that notice may be shown by proof that the plaintiff took or read a newspaper in which it was published; without proof that the newspaper was taken by the plaintiff, such evidence is inadmissible.

But it is not to be taken as a legal incident of the position of a dormant partner, but rather as a probability arising from the greater likelihood of his share in the firm being unknown to those who deal in it, that his liability ceases upon the actual dissolution of the partnership, while that of an ostensible partner continues toward persons who have no notice of the dissolution; for although, generally speaking, a dormant partner may retire without giving notice to the world, *Heath vs. Sansom*, 4 B. & Ad., 172; *Deford vs. Reynolds*, 12 Casey, 325, 332; *Gregler vs. Durham*, 9 Indiana, 175, yet even such a partner remains liable to persons who became aware of his partnership while it lasted, and continued their dealings with the firm under the belief that he still remained a member of it. If such persons were not made aware of the dissolution, it might be inferred that they dealt in the faith of the partnership; and so, to them, unless the circumstances of the case rebutted such an inference, even a dormant partner would still be liable.—*Evans vs. Drummond*, 4 Esp., 89; *Carter vs. Whalley*, 1 B. & Ad., 13; *Farrar vs. Deflinne*, 1 Car. & K., 580, *Cresswell, J.*; *Park vs. Wooten*, 35 Alabama, 242; see *Pratt vs. Page*, 32 Vermont, 13. Whether a creditor who is in the habit of dealing with the firm is entitled to notice of the withdrawal of a dormant partner, depends in general on whether the participation of the latter in the firm was known to the creditor.—*Gregler vs. Durham*, 9 Indiana, 175.

It has been said that a participation in the profits indicates a partnership. But the participation must be that of a person having a right to the share of the profits, and to an account in order to ascertain his share, not that of a mere servant or agent receiving, in respect of his wages, a sum proportioned to a share of the profits, or which may be partly furnished out of the profits. The distinction on this subject has run so fine, that it will not be uninteresting briefly to review the principal cases, and endeavor to extract from them some rules for ascertaining when a particular contract falls under the head of partnership, and when under that of ordinary agency or service. In *Dixon vs. Cooper*, 3 Wils., 40, in an action for goods sold and delivered, the plaintiff, in order to prove his delivery, called his factor, who was to receive a shilling in the pound upon the price. It should be observed on this case, that though the factor would have incidentally come in for a share of the profits arising from the sale, yet he did not, like a partner, depend for his remuneration upon the contingency of profits accruing, since, as his commission was calculated upon the price, he would have been entitled to it even had no profits been obtained; and this very distinction has been acted on in *Dry vs. Boswell*, 1 Camp., 329, where it was held that an agreement that A should

work B's lighter, and that they should share the profits, constituted a partnership; but an agreement that A should receive half her gross earnings only rendered him B's agent for the purpose of working her. The case of *Benjamin vs. Porteus*, 2 H. Bl., 590, went somewhat further. There, in an action for the price of indigo, sold at three shillings per pound, the broker, being called to prove the contract, stated on the *voir dire* that he was to have all that he could for the indigo above half a crown per pound, instead of the usual commission on the price; Eyre, C. J., rejected him as incompetent, and directed a nonsuit, which was, however, set aside by the Court of Common Pleas, Eyre, C. J., *dissentiente*.

In *Wilkinson vs. Frazer*, 4 Esp., 182, it was held, that an agreement to divide the produce of a whaling-voyage between the captain, seamen, and owners did not constitute them partners, so as to prevent the seamen from recovering their share in an action. This case goes no further than *Dixon vs. Cooper*, since the seamen would have been entitled, though the owners might have gained no profit by the voyage. Vide *The Riby Grove*, 2 Rob., 52. In *Mair vs. Glennie*, 4 M. & S., 240, Lord Ellenborough expressed an opinion that an agreement to remunerate a captain with one fifth of the profit on the intended voyage on ship and cargo, so as to prevent a transferee from obtaining such possession of it as would prevent it from remaining in the order and disposition of the transferor, who afterward became bankrupt. In *Harrington vs. Churchward*, 29 L. J., Chan., 521, the plaintiff was employed at a certain salary, and, in addition thereto, was to have a sum equivalent to ten per cent. on the profits, and he was held not to be a partner in the undertaking. Vide also *French vs. Styring*, 2 C. B., N. S., in which the question was raised, whether owners in common of a race-horse, though not partners in the horse, were not partners for the purpose of its management. The action was by one owner against the other for half of the keep and expenses of the horse; and the agreement appearing to be that the plaintiff was to keep, etc., the horse, and the defendant to pay him half the keep, etc., and that the winnings of the horse should be equally divided between them, it was held, that even supposing a partnership to exist, the plaintiff was entitled to recover, since his demand would, on that supposition, be for advances of capital to his copartner. Part owners of ships are not necessarily partners.—*Helme vs. Smith*, 7 Bing., 709; *Brodie vs. Howard*, 17 C. B., 109; *Mitcheson vs. Oliver*, 5 E. & B., 419.

It must be remarked, that in *Wilkinson vs. Frazer* the question was between the seamen and the captain, not between the seamen and third parties; and that neither in *Benjamin vs. Porteus*, *Dixon vs. Cooper*, *Mair vs. Glennie*, or *Harrington vs. Churchward*, was the liability of an agent, receiving part of the profits as his remuneration, to third parties at all in question. In the two former cases he was equally interested in the result of the cause, whether he were a factor or a partner, and, if considered a factor, would be rendered competent only by an exception in the law of evidence,

introduced for general convenience, not on account of the difference between the liabilities of a factor and those of a principal.

Now it seems very reasonable to allow persons sharing in the profits of an adventure carried on by them jointly, to exclude, by express agreement, the relation of partnership from arising as between themselves, and at the same time prohibit them from so excluding it to third persons dealing with them, for the rights and liabilities of partners *inter se* have been created by the law for their own convenience. But to allow a person on whose account the adventure is really prosecuted, and who receives part of the profits, to shield himself from the creditors of the firm, under the plea that he receives them as an agent, would militate against the reason given by Eyre, C. J., in the principal case, who places the liability of a participant on the ground that, by taking part of the profits, he takes from the creditors part of their security, and against the better reason given in *Wheatcroft vs. Hickman*, *supra*.

Thus, as we have already seen, persons who participate, even as principals, in the profits of an adventure prosecuted on their behalf, may, by express stipulation, prevent the ordinary incidents of partnership from arising as between themselves, but can not except themselves from any of the usual responsibility of members of a firm to strangers.

Upon the whole, the cases justify the conclusion, that whenever it appears that the agreement was intended by the parties themselves as one of agency or service, but the agent or servant is to be remunerated by a portion of the profits, then the contract would be considered as between themselves one of ordinary agency, *Geddes vs. Wallace*, 2 Bligh, 270; *R. vs. Hartley*, Russ. & R., 139; but as between them and third persons, one of partnership, provided the adventure was really carried on by them on their joint account. If, however, the agent or servant is to be remunerated, not by a portion of the profits, but, as in *Drey vs. Boswell*, *Dixon vs. Cooper*, and *Wilkinson vs. Frazier*, by part of a gross fund or stock which is not altogether composed of the profits, the contract, even as against third persons, will be one of ordinary agency, although that fund or stock may include the profits, so that its value, and the quantum of the agent's reward, will necessarily fluctuate with their fluctuation.

There is a third case, that, viz., in which the agent or servant is not to receive a part of the profits in specie, but a sum of money calculated in proportion to a given quantum of the profits. In such case Lord Eldon has expressed his opinion, that the agent so remunerated would not be a partner, even as to third persons. "It is clearly settled," said his lordship, in *ex parte Hamper*, 17 Ves., 112, "though I regret it, that if a man stipulates that he shall have as the reward of his labor, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is as to third persons a part-

ner." In another part of the same case he says: "The cases have gone to this nicety, upon a distinction so thin, that I can not state it as established upon due consideration, that if a trader agree to pay another person for his labor in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, he is a partner."—17 Ves., 404; vide *ex parte* Watson, 19 Ves., 461; Harrington vs. Churchward, 29 L. J., Cha., 521. The criterion proposed by De Grey, C. J., in *Grace vs. Smith*, 2 W. Bl., 998, "to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment, a distinction not more nice than usually occurs in questions of trade and usury," was cited as correct by Tindal, C. J., in delivering the judgment of the court in *Pott vs. Eyton*, 3 C. B., 32. In *Pott vs. Eyton*, A, a part owner of a mine, set up a tally-shop for the supply of articles to the miners, his own name being over the door and in the excise licenses; and he arranged with B to supply the goods and conduct the business, on the terms that B should allow A five per cent. on the amount of sales to the miners, and retain the rest for himself. That was found by the jury, and afterward held by the Court of Common Pleas, not to constitute an actual partnership; and Tindal, C. J., in delivering judgment, referred to the cases already mentioned, and, after citing the dictum of Lord Eldon, in *ex parte* Watson, that "one who receives a salary not charged upon profits, according to a known though nice distinction, is not by that a partner," proceeded to say that it makes no difference "whether the money is received by way of interest, or money lent, or wages, or salary as agent," or commission on sales; and that the payment of the five per cent. to A was "in the nature of commission on certain sales supposed to be effected through his influence over his workmen, and was not sufficient to render him, as a matter of legal inference, liable as a partner; and, in so far as it was a question of fact, it was disposed of by the jury." Vide *Barry vs. Nesham*, 3 C. B., 641, for a case where a share of the profits was stipulated for.

It may still be useful to keep in mind the above distinctions, although the broad test of partnership propounded in *Wheatcroft vs. Hickman* may be sufficient to solve the question of liability as partner in the generality of cases.

In *Withington vs. Herring*, 3 M. & P., 30, some of the judges of the Common Pleas seem to have thought that a bill drawn on H and Co. by a person who acted as their agent abroad, in a concern in which he was to receive £1000 per annum salary and one fifth share of the profits, could not be considered as a bill drawn by a partner. The point, however, was not decided, as it appeared clear that he had authority to draw the bill, even assuming him to be but an agent. It may be added, that the mere circumstance that a man has an option to become a partner and to receive a share of the profits, even from a past time, has been holden insufficient to constitute him a partner before he has exercised that option, and



thereby become entitled to an account of the profits.—*Gabriel vs. Evill*, 9 M. & W., 297, at N. P., Car. & M., 358; see *ex parte Turquand*, 2 M. D. & D., 340; *Wilson vs. Whithead*, 10 M. & W., 303; see *Hubbel vs. Wolf*, 15, Indiana, 204; *Williams vs. Souther*, 7 Clark, 435.

With respect to nominal partnership, that takes place where a person, having no real interest in the concern, allows his name to be held out to the world as that of a partner, in which case the law imposes on him the responsibility of one to persons who have had dealings with the firm of which he has held himself out as a member.

It has, as we have seen, been laid down in *Young vs. Axtell*, that it makes no difference in such a person's liability that the party seeking to charge him did not know at the time when he gave credit to the firm that he had so held himself out. But this position appears very questionable; for the rule which imposes on a nominal partner the responsibilities of a real one, is framed in order to prevent those persons from being defrauded or deceived who may deal with the firm of which he holds himself out as a member on the faith of his apparent responsibility. But where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies, and there is not wanting authority opposed to such an extension of the rule respecting a nominal partner's liability.—*Bowie vs. Maddox*, 29 Georgia, 285. "If it could be proved," says Parke, J., "that the defendant held himself out, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable."—*Dickinson vs. Valvy*, 10 B. & C., 140. Vide *Teller vs. Patten*, 20 Howard, 125. So also in *Shott vs. Streatfield* and another, 1 M. & Rob., 9, where the question was, whether Green was liable jointly with Streatfield, a witness proved that he had been told in Green's presence that Green had become a partner; he was then asked "whether he had repeated the information?" on which it was objected that this was not evidence unless it were shown that the defendants, or one of them, were present when it was repeated; *sed per* Lord Tenterden, C. J., "I think it is; because otherwise it will be said presently that what was said was confined to the witness, and that the plaintiff could not have acted on it." In *Alderson vs. Ropes*, 1 Camp., 404, n., it was held, that a man could not be charged as a partner by one who, when he contracted, had notice that he was but nominally so. The reason of this must have been because he could not have been deceived, or induced to deal with the firm by any reliance on the nominal partner's apparent responsibility; and the same reason precisely applies, whether the false impression in the customer's mind has been put an end to by a notice, or whether, in consequence of his ignorance that the nominal partner's name has been used, no false impression ever existed on his mind at all. See *Carter vs. Whalley*, 1 B. & Ad., 11; *Pott vs. Eyton*, C. B., 32.

However, in order to fix a person with this description of liability, no particular mode of holding himself out is requisite. If he do acts, no matter of what kind, sufficient to induce others to believe him a partner, he will be liable as such. Vide *Spencer vs. Billing*, 3 Camp., 310; *Parker vs. Barker*, 1 B. & B., 9; 3 Moore, 226; *Gurney vs. Evans*, 3 H. & N., 122.

But a man who describes himself as a partner with another in one particular business does not thereby hold himself out as such in any other business which that other may happen to profess. — *De Berkomp vs. Smith*, 1 Esp., 29; *Ridgway vs. Phillips*, 5 Tyrw., 131. Nor is a person liable as a nominal partner because others, without his consent, use his name as that of a member of their firm, even although he may have previously belonged to it, provided he have taken the proper steps to notify his retirement. — *Newsom vs. Coles*, 2 Camp., 617. Nor, as has been already stated, can a man be charged as a member of a firm by one who had express or implied notice, *Bromley vs. Elliott*, 58 New Hampshire, 287, 302; *Livingston vs. Roosevelt*, 4 Johnson, 251, that he was but nominally so. — *Alderson vs. Ropes*, 1 Camp., 404, *in nota*.

The reader is referred to the authorities collected in *Smith's Leading Cases*, sixth American edition, with notes by Messrs. Hare and Wallace, to which the author is indebted for the American decisions collated upon the subject of partnership.

**Order of Discharge to Partners.**—The section provides, that the order of Discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one partner alone. Each partner should apply for his order of Discharge, at least such is the practice in the English courts, upon his own separate petition, and such application will be judged of by the merits or demerits of the individual partner's conduct.

The order of Discharge, when granted to a partner under a separate adjudication of bankruptcy against him, will operate to release him from both *joint* and *separate* debts, and when granted under a joint adjudication against him with other members of the firm, will release him from both *separate* and *joint* debts. — *Etc parte Yale*, 3 P. Wms., 24, n.; 1 Sel. N. P., 232.

**Residence of Partners in different Districts.**—When copartners reside in different districts, that court in which the petition is first filed is to retain exclusive jurisdiction over the case. The object of this provision, adopted from the recent English acts, is to avoid the conflict which frequently arose as to the place in which, in the event of the non-residence of partners within the jurisdiction where the proceedings were originally commenced, should be carried on.

**Corporations and Joint-stock Companies liable to the Bankrupt Law.**—For the first time in this country corporations which partake of the character of *moneyed, business, or commercial corporations* and joint-stock companies, are made liable to the law of bankruptcy.

Until a very recent period, corporations and joint-stock companies were exempt from the operation of the Bankrupt Law in England. The experiment, however, was made, of including them within its provisions by the Statute of 24 and 25 Vict., c. 134, and has operated with great success. It effected great changes in the commercial relations between these trading corporations and companies and their creditors, by subjecting the directors, managers, and other officers to the stringent provisions of the Bankrupt Law, defeating all fraudulent conveyances and assignments, and exacting a strict account of all their dealings and transactions by compelling a submission to examination and searching investigation through the machinery of the Bankrupt Laws. The author is indebted to the able and learned treatise upon the Law of Private Corporations Aggregate, by Mr. Lathrop, of the Boston bar, for the following summary of the constitution, powers, and liabilities of trading corporations and joint-stock companies in the United States:

We have in this country an almost infinite number of corporations aggregate, which have no concern whatever (other than as artificial inhabitants) with affairs of a municipal nature. These associations are not only scattered throughout every cultivated part of the United States, but so engaged are they in all the varieties of useful pursuit, that we see them directing the concentration of mind and capital to the advancement of religion and morals; to the diffusion of literature, science, and the arts; to the prosecution of plans of internal communication and improvement; and to the encouragement and extension of the great interests of commerce, agriculture, and manufactures. There is a great difference, in this respect, between our own country and the country from which we have derived a great portion of our laws. What is done in England by combination, unless it be the management of municipal concerns, is most generally done by a combination of individuals, established by mere articles of agreement. On the other hand, what is done here by the co-operation of several persons, and by the combination of their capital, industry, and skill, is, in the greater number of instances, the result of a consolidation effected by an express act or charter of incorporation.

Private corporations are indisputably the creatures of public policy, and, in the popular meaning of the term, may be called public; but yet, if the whole interest does not belong to the government, as if the corporation is created for the administration of civil or municipal power, the corporation is private. A *bank*, for instance, may be created by the government for its own uses; but if the stock is owned by private persons, it is a private corporation, although it is erected by the sanction of public authority, and its objects and operations partake of a public nature. Railroads are private corporations, and, "generally speaking," says the court in the case of *Bonaparte vs. Camden Railroad Company*, "public corporations are towns, cities, counties, parishes, existing for public purposes; private corporations are for banks, insurance, roads, canals, bridges, etc., where the stock is owned by individuals, but their use may be

public." In all the last-named and other like corporations, the acts done by them are done with a view to their own interest; and if thereby they incidentally promote that of the public, it can not reasonably be supposed they do it from any spirit of liberality they have beyond that of their fellow-citizens. Both the property and the sole object of every such corporation are essentially private, and from them the individuals composing the company corporate are to derive profit.

By a statute of New York of 1811, manufacturing corporations may be created by the mere association of five or more persons filing a certificate designating their names, object, and location. The numerous decisions which have been made in New York in reference to banking institutions, have established beyond a doubt that the companies formed under the act of 1838 are corporations. When the question was before the Court of Errors, there was no doubt as to the extent of the powers possessed by banking associations. The only question was as to which class of legal existences bodies corporate with such powers properly belonged. The court decided they were corporations; that is, that which the Legislature intended to create, and did create, was, according to the correct legal construction, a corporation. Persons intending to institute an association under this law, authorizing the business of banking, after subscribing articles of association, proceeded to elect a president and directors. The directors signed and recorded a certificate of its organization, made in the form prescribed, and proceeded to transact business. This certificate not being signed by the stockholders, was not in compliance with the law, and, consequently, they had no corporate capacity.

The State of New York, in 1849, effected two important assimilations of natural persons to corporations. It enabled every voluntary joint-stock company, when composed of seven or more persons, to sue and be sued, in the name of its president or treasurer, and guarded against the abatement of the suit by removal from office, or the death of the officers or any of the associates.

The General Banking Law, and the general laws for the formation of manufacturing establishments, insurance companies, plank, turnpike, and railroads, go far also to enable any natural person to transact business for himself under a corporate organization.

In Michigan, by an "act to organize and regulate banking associations," it is provided, that application is to be made in writing to the treasurer and clerk of the county where the business is to be carried on, stating the amount of capital proposed. Of this application public notice is required to be given. The capital stock is limited, and the subscriptions are to be received and apportioned, etc. Ten per cent. on the shares subscribed is required to be paid. Then, on notice being given to the stockholders, they are authorized to meet and elect nine directors, a majority of whom are authorized to manage the affairs of the association. They are required to elect one of their number president; and it is provided, that "all such persons as shall become stockholders in any such association, shall,

on compliance with the provisions of this act, constitute a body corporate and politic, in fact, in name, and by such name as they shall designate and assume to themselves; and by such name, they and their successors shall and may have continued succession, and shall, in their corporate capacity, be capable of suing and being sued." The act not only gives in terms all the requisites to form a corporation, but the body, when formed, is technically designated by it as such.

"Could the Legislature," says Mr. J. McLean, "in language more clear and forcible, have created corporations? Not a *quasi* corporation, not a joint-stock company or a limited partnership, but, substantially and technically, a corporation."

The laws of Massachusetts have given as great facility to the institution of corporations. When any lands, wharves, or other real estate are held in common by five or more proprietors, they may form themselves into a corporation. By subsequent statutes, three or more persons, who shall have associated themselves by articles of agreement in writing for the purpose of cutting, storing, or selling, or of carrying on any mechanical, mining, quarrying, or manufacturing business, except that of distilling or manufacturing liquors, are constituted a corporation. Ten or more may organize as a corporation for the purpose of making and selling gas as a light in a city or town, or for the business of banking; and seven or more proprietors of a library may form themselves into a corporation.

Where several individuals signed articles of association for such purposes as were contemplated by the statutes of the State of Vermont of 1797 and 1814, and the form adopted was substantially in conformity to the one prescribed and provided for the election of the trustees, etc., and no words were used indicating an intention not to form themselves into a body corporate, it was held, that they became a corporation under those statutes, notwithstanding they did not describe themselves as inhabitants of any town, and made no reference in their articles of association to the first section of the Statute of 1797.

In private corporations aggregate, for the sake of convenience, the whole management of their affairs is usually vested by charter in certain officers and boards, the body of the members having no voice except in their election. When this is the case, the power of making deeds, like every other power, rests with them; and the courts will not interfere upon a petition, even of a majority of the members, to compel that body, contrary to their own judgment, to affix the common seal to any instrument, and still less can the stockholders, by their vote, authorize the making of a deed, as a lease of the corporate property. Sometimes the charter or act of incorporation requires a certain number of a special body or board existing within the corporation to be present at the doing of any corporate act, or at the making of particular species of contracts, as deeds; and in such a case, the number must be present at the making of the deed, in order to its validity as a corporate act. But though by charter a certain number of a board are required to con-

cur in entering into a special contract, or making a deed, it does not follow that the affixing of the seal, which is merely a ministerial act, may not be done by a less number than were at first competent to enter into the contract, provided it were done by the direction of a legal quorum.

The power to appoint officers and agents rests, of course, like every other power, in the body of the corporators, unless some particular board or body created or existing within the corporation is legally vested with it; and courts can not judicially notice that a particular board or body of the corporation is authorized by the charter and by-laws to appoint agents, where the evidence of the charter and by-laws is not introduced. Where the charter or act of incorporation speaks upon this subject, it must be strictly pursued, or the appointment may be avoided. The directors of a corporation, specially empowered by the charter to contract on its behalf, have no power to appoint sub-agents to contract for the corporation unless such power is expressly given them, and, accordingly, contracts made by such sub-agents will not be binding on the corporation. Canal commissioners can not delegate the authority vested in them to enter upon and take possession of lands for canal purposes; but this must be done by themselves, or under their express directions, as in other cases of personal confidence and trust where judgment and discretion are required or relied on. And where, by a bank charter, the power of discounting notes and bills was vested in the board of directors, it was held in Louisiana that they could not delegate this trust to an agent or agents of the board. In such case, indeed, it would be a violation of the charter, for which the corporation would be held responsible, for the board of directors to authorize their president, or cashier, or any other officer of the bank to make loans and discounts without having the same formally passed upon by the board. Neither can an agent, appointed by the corporation, and authorized to make a particular contract or to do a certain piece of business, delegate his trust, unless specially empowered so to do; the personal confidence of the principal in the agent being the supposed motive of the selection and appointment of the latter. Accordingly, where the directors of a turnpike corporation were empowered by the corporation to contract for the making of the turnpike road, and they, without authority so to do, appointed sub-agents, who covenanted on behalf of the directors to pay certain sums for the making of the road, it was decided by the Supreme Court of Massachusetts that the corporation was not bound by the contract, since it had given its directors, its immediate agents, no power to substitute agents under them. And if three persons are appointed by a corporation for a particular purpose, all must act, and no contract can be made by two of the three which will be binding upon the corporation. It was accordingly held, that not only might the directors of a bank mortgage its real estate to secure a debt due from the bank, but might delegate such an authority to a committee of their own number.

Generally speaking, any persons may, by due appointment, be

agents of corporations as well as of natural persons; and it is a well-established principle, that they even who are disqualified to act for themselves, as infants and *feme covert*s, may yet act as the agents of others. A corporation may employ one of its own members as agent to act as auctioneer at the sale of its pews, who may make the memorandum of sale required under the Statute of Frauds to bind the purchaser.

It is not unusual, however, for the charters of banking, insurance, and turnpike companies to prescribe who, and who alone, shall be the agents of the company for particular purposes; and in such cases the boards or persons specified, and they alone, for those purposes, are or can be the agents of the corporation. Such being created agents by the charter or act of incorporation, the power of appointing others in their stead, by the very nature of its law, never existed in the corporation. These boards, it is true, are elected by the stockholders, but are constituted agents of the corporation, and derive all their authority from the charter. Accordingly, where the member of a turnpike company agreed to pay the installments on his stock in such manner and proportion as the president, directors, and company of the corporation should direct, it was decided that he bound himself to pay according to the order of the president and directors, since they were the representatives of the corporation, and were by the charter alone authorized to manage its concerns. A statute incorporating an insurance company enacted, that no losses should be paid without the approbation of at least *four* of the *directors*, with the president and his assistants. An attempt was made to charge the company with a total loss, upon a verbal agreement to accept an abandonment and pay a total loss, made by the *president* and *assistants* merely, at a meeting, when it did not appear that a single director was present. The Supreme Court of the State of New York decided, that the acceptance, not having been made by the agents constituted by the act of incorporation, was not binding on the company. If the charter has invested a particular board, or select body, with the power to manage the concerns of the corporation, the body at large have no right to interfere with the doings of these, their charter agents, and courts will not, even upon a petition of a majority of the members, compel the board to do any act contrary to their own judgment. The directors of a bank are the sole judges of what portion of the profits of the bank they ought from time to time to divide; and their judgment in such matters will not be controlled by the courts, even though they may deem it honestly erroneous.

Boards of directors, managers, etc., are agents of the corporation only so far as authorized to be directly or impliedly by the charter; and the general authority given by the act of incorporating a manufacturing corporation to the directors, to manage the stock, property, and affairs of the corporation, does not enable them to apply to the Legislature for an enlargement of the corporate powers; and a legislative resolve passed upon such an application without authority from the company is void. Neither has a board of bank

directors any right to pass a resolution excluding one of its number from an inspection of the bank books, upon the ground that he was hostile to the interests of the bank; and a mandamus will lie, directed to the cashier, commanding that the books be submitted to the inspection of a director thus excluded. The directors have, in general, power to control all the property of the bank, and may authorize one of their number to assign any securities belonging to it; whether they have, in general, power to assign all the estate, real and personal, of the corporation to a trustee, for the purpose of winding up and closing its concerns, without the assent of the stockholders, may be doubted. The Supreme Court of Pennsylvania have, however, held, that such a power was vested in the directors of the Bank of the United States. The directors of a bank may authorize the president and cashier to borrow money or obtain discounts for the use of the bank; and the power of making discounts, and of fixing the conditions of them, is in general solely with them. The board of directors of a banking corporation having passed a resolution authorizing the stockholders to transfer their stock to the bank in payment of their debts to it, several of the stockholders availed themselves of the authority of the resolution, and discharged their debts to the bank in this way. It was decided that the directors had power to pass the resolution, and that the stockholders were legally authorized by it thus to pay their debts to the bank, and that, notwithstanding that the bank had since stopped payment, equity would not compel a resumption of the stock by the stockholders, or compel them to pay their debts with other means. Where the trustees of a religious corporation purchased lands with the corporate funds, and took the deeds in their individual names, it was considered that they held the lands as trustees for the corporation, and that, if they subsequently sold the lands, the proceeds belonged to the corporation, and were to be held for its use.

In treating of the nature and meaning of civil corporations established for the purposes of trade and commercial adventure, it is to be observed that they are distinguishable from the common association of partnership, in respect to the personal liability of the members for the company's debts. No such personal liability attaches to the individuals united under the sanction of the government and invested by charter, or other act of legislation, with the full powers and immunities of a corporate body; while, on the other hand, each and every individual of a common partnership association is personally responsible for every debt of the firm. There is the same distinction between incorporated and unincorporated *joint-stock* companies—the latter, in fact, being but partnerships, though established on a large scale, and consisting of an indefinite, or of a very large number of joint undertakers. Whatever name they may assume and use, in the transaction of their business, it is but a *partnership*, and not a corporate designation; and every suit upon a contract with the company must be brought in the names of the several persons composing the firm. Still, the object of their



institution is to prosecute some important undertaking, for which the capital and exertions of a few individuals would be inadequate, like most of the English Fire and Life Insurance Companies, which have no charter, or any corporate functions or immunities conferred upon them by the government. They differ, it is true, from ordinary partnerships in their formation, and a variety of acts are to be done before the partnership is actually commenced, which is either under what is called "a deed of settlement," or under what is called a provisional agreement. The first is a covenant between a few of the shareholders chosen as *trustees* for the purpose, and the other, by which each of the latter covenants with the rest of the shareholders for the due performance of a series of articles which are set forth; and this deed is the only instrument of regulation, and, as between the shareholders themselves, contains the law affecting them. Upon points, however, which are not comprehended in the deed, the general law of partnership prevails; and even as to the provisions of the deed itself, effect would be given to, or taken away from it, by the courts of law and equity. But, as to the transactions between the company and the world, the deed of regulation is wholly inoperative, and the shareholders stand upon the same footing as ordinary partners in respect to the rights and remedies of the persons with whom they deal. "It is well known," says Chancellor Walworth, "that there are and have been many joint-stock, and even banking companies, which are mere partnerships, as to every person except their own stockholders, they never having been legally incorporated." A provisional agreement may be defined as containing the heads of certain stipulations which it is intended should thereafter be comprised within a deed of settlement, where such an instrument is in the contemplation of the parties. It is sometimes nothing more than a prospectus, and frequently so publicly advertised. In like manner as a deed of settlement, it contains the conditions which regulate the proceedings of the shareholders *inter seipsos*.

If there is nothing in the constitution of a joint-stock company which regulates the remedies of the shareholders among themselves, the general law of partnership governs.—*Bullard vs. Kinney*, 10 Calif., 60.

Civil corporations include not only those which are public, as cities and towns, but private corporations created for an infinite variety of temporal purposes. But the most numerous, and, in a secular and commercial point of view, the most important class of private civil corporations, and which are very often called "companies," consists at the present day of banking, insurance, manufacturing, and extensive trading corporations; and likewise of turnpike, bridge, canal, and railroad corporations. The latter kind have a concern with some of the expensive duties of the State, the trouble and charge of which are undertaken and defrayed by them in consideration of a certain emolument allowed to their members; and in cases of this sort there are the most unquestionable features of a contract, and manifestly a *quid pro quo*.

These joint-stock corporations, by a combination of capital and skillfully-directed labor, have wonderfully contributed to the commercial prosperity of our country, and at no former period were they ever more rapidly increasing numerically than at the present. They are distinguishable from common partnership associations and simple joint-stock companies, and in connection with the restricted and limited powers with which they are often created, and by which they are to be governed. A trading association may be but a mere partnership, or it may have corporate powers to a small extent, and *sub modo*; or it may be invested with corporate functions to a considerable, and yet limited extent, or it may exist with all the incidental functions and peculiar privileges which a grant of unconditional corporate power confers.

The difference between a company established for private hazard and profit by an act or charter of incorporation and an ordinary copartnership is obvious and striking. The latter is simply a voluntary contract, or the result of such contract, whereby two or more persons agree to combine their property or labor, or both, for the purpose of a common undertaking and the acquisition of a common profit, and the gain or loss is to be proportionately shared between them. But this definition greatly falls short of a company established as a body corporate, which, though originating in a voluntary contract, is the result not only of that, but of its confirmation by special legislative authority. This conformation is indispensable to enable the parties to the contract to sue and be sued as a company by a general name, to act by a common seal, and to transmit their property in succession. One, if not the principal and main inducement, in procuring an act of incorporation, is to limit the risk of the partners, and to render definite the extent of their hazard; for it is a perfectly well settled rule of law, that each member of a common partnership, whether active, nominal, or dormant, is the accredited agent of the others, and as such has authority to bind them to the extent of their private property by any simple contract he may make, either respecting the goods or business of the concern, or by negotiable instruments in its behalf, to any person dealing *bond fide*.

With the view of encouraging persons to an active and useful employment of their capital, a species of partnership has been introduced in different parts of the world, with a restricted personal responsibility, and it, on that account, may be called a *quasi* corporation, and therefore is entitled to attention in treating of private, civil, and commercial corporations. Though the English law does not admit of partnership with restricted responsibility, they have been established in different parts of the Continent and in this country. In France, by the celebrated ordinance of 1673, la Société en Commandite, or a limited partnership, was introduced for promoting the interests of the mercantile community and the benefit of the public, by which one or more persons were associated with one or more sleeping partners, who furnished a certain proportion of capital, and were liable only to the extent of the funds furnished.

This peculiar kind of partnership has been continued by the new commercial code of France. It has been introduced into the civil code of Louisiana, under the title of partnership *in commendam*. On account of its tendency to invite dormant capital into active and useful employment, it has obtained a very considerable extent of favor throughout the United States, and accordingly it has been authorized by a legislative enactment in the States of New York, Massachusetts, Rhode Island, Connecticut, Vermont, New Jersey, Pennsylvania, Maryland, South Carolina, Georgia, Alabama, Florida, Mississippi, Indiana, and Michigan. The provisions of the New York act having been taken, in most of the essential points, from the French ordinance and code above named, and the provision for limited partnership in the other States, and which were subsequent in point of time to that of New York, is essentially the same. It is the first instance, says Kent, in the history of the legislation of New York, that the statute law of any other country than Great Britain has been closely imitated and adopted.

Where an association which has existed as a mere copartnership becomes incorporated, and the corporation then accepts an assignment of all the property of such association for the purpose of carrying out their objects, they are primarily, and jointly, and severally liable for all the debts incurred before the act of incorporation. The incorporation of a joint-stock company in Pennsylvania, which had united under articles, one of which provided for an application to the Legislature for a charter, does not substitute the responsibility of the corporation for contracts previously made with the associates and exempt the members from liability beyond the joint funds. And the action of the Legislature declaring the corporation solely responsible on such contracts, without the assent of all the parties, is in direct contravention of the provision of the Federal Constitution which interdicts the impairing of the obligation of contracts.

Whatever may be the stipulations voluntarily entered into between the parties to a copartnership, they can not arrange to themselves the functions of a corporation; and without an express sanction of the Legislature, amounting at least to the creation of a *quasi* body corporate, they can not form an association capable of acting independently of the rules and principles which govern a single copartnership. "Stipulations," says Lord Brougham, "for the purpose of restricting the liabilities of partners, would plainly be of no avail; and whoever," he adds, "becomes a subscriber upon the faith of the restricting clause, or of the limited responsibility which that holds out, would have himself to blame, and be the victim of his ignorance of the known law of the land." A very serious practical result of the inflexibility of the rule of the personal liability of the members of a commercial firm, according to Bell, the author of the Commentaries on the Law of Scotland, occurred in that country in the case of the Douglas Bank. "That bank," says he, "was formed for the generous but short-sighted purpose of relieving the distressed of the country, occasioned by the excessive use of bills of exchange and the stop in the usual discounts to which the regular banks were

forced to have recourse. After the bank had been established a little more than two years it failed, with a loss of £430,000. Many of the stockholders were eminent lawyers, and they raised every possible point in order to shield themselves and their families from the *personal responsibility* of the members of a company so circumstanced; but it was never for a moment imagined that the partners were not responsible for the last fraction of the debts." But an eminent jurist has suggested that it may well deserve inquiry how far stipulations in articles of copartnership, which limit the responsibility of the members to the mere joint funds, or to a qualified extent, will be binding upon their creditors, who have due notice of such a stipulation.

This personal liability of the members of unincorporated joint-stock companies is inconsistent with one fully endowed with a corporate character, as, in the case of the latter, the law recognizes only the creature of the charter, and knows not the individuals. Thus it is that the proceedings of a vestry of a church, pledging its corporate funds to persons who might perform work or furnish materials for it, can impose no personal liability upon the members of the vestry; and an impression, moreover, subsequently manifested by them, that they had assumed a personal responsibility, can not vary the legal interpretation of the act upon which the question of responsibility depends. The provision of the section will only apply to moneyed, business, or commercial corporations and joint-stock companies, and obviously excludes private corporations and joint-stock companies incorporated by charter or voluntary association, where the objects of such corporation and joint-stock company apply to promote scientific and literary objects or agricultural pursuits. They must, in fact, to be subject to the law of bankruptcy, carry on some business, trade, or manufacture for the purpose of profit.

Any corporation or joint-stock company owing debts to the amount of three hundred dollars may petition in like manner as any other debtor for adjudication in bankruptcy. Such petition must be presented and signed by some authorized officer of such corporation or joint-stock company, and that officer must have been duly authorized by a vote of a majority of the corporators present at a legal meeting called for that purpose.

This will, of course, be regulated by the rules and by-laws of each individual corporation or joint-stock company.

In the case of proceedings to obtain an adjudication in compulsory bankruptcy, the proceedings will be the same as in the case of an ordinary debtor; and the reader is referred to the notes to Sections 11 and 39.

All assignments, conveyances, and payments, declared fraudulent and void by this act, when made by any debtor, are in like manner, and to a like extent, declared by the section to be fraudulent and void when made by any corporation or joint-stock company, and the assignees of such corporation or joint-stock company have the same rights and remedies under the bankruptcy as in

the case of any other debtor adjudicated bankrupt. All the estate and property of such corporation or joint-stock company is to be dealt with under the bankruptcy precisely in the same manner as that of other debtors; proofs of debts to be made by the creditors, and dividends to be distributed as in other cases.

Misconduct by the authorized officers of the company is liable to be punished in the same manner as that of other debtors; and although no order of Discharge under the act is to be granted to any corporation or joint-stock company under the bankruptcy, the officers of such corporations and joint-stock companies are amenable to the penalties imposed by Section 44.

It is presumed that the bankruptcy of a corporation would amount to the forfeiture of the charter of such corporation by analogy to those cases in which the courts have declared such charters forfeited.

The insolvency of a bank, and an assignment by it of so much of its property to trustees for the payment of its debts as to prevent it from resuming banking business, the purpose for which the bank was instituted being thus defeated, though not *per se* a dissolution, is good cause of forfeiture on *quo warranto*. — People vs. Hudson Bank, 6 Cowen, 217; People vs. Niagara Bank, *id.*, 196. Vide also Bank Commissioners vs. Bank of Brest, Harrington, Ch. Mich., 106, 111, 112; State vs. Commercial Bank, 13 Smedes & M., 569; Carey vs. Greene, 7 Ga., 79.

In general, to work a forfeiture there must be something wrong arising from *willful abuse* or improper *neglect*, something more than *accidental negligence*, *excess of power*, or *mistake* in the mode of exercising an acknowledged power.

The withdrawing of stock under the form of loans on private security by a bank, with intent to reduce the effective capital of the institution below the amount required by the charter, may be good cause of forfeiture, although it is discretionary with the court, on proceedings to procure a forfeiture of the charter for such cause, whether it will declare the charter forfeited; and it will not do so if no existing danger to the community require it. The contracting of debts, or issuing of bills to a larger amount than the charter allows, or issuing with a fraudulent intention more paper than the bank can redeem, or embezzling large sums deposited for safe keeping, or making large dividends of profits, while it refuses to pay specie for its bills, all subject a bank to the forfeiture of its charter. The establishment by a bank located by its charter in one county of an agency in another county, where it receives deposits and buys and sells exchange, is a violation of its charter, and was held in Michigan a good cause of forfeiture, although only punished with fine and costs, under the discretion vested in the court in such cases.

As to what acts of bankruptcy, when committed by a corporation or joint-stock company, will render them liable to be made bankrupt compulsorily, vide Section 39 and notes. As yet, there has been no reported decision in the English courts upon this question, but it is presumed that they would be bound by the acts of

their authorized officers. For instance, it has been decided that the loaning by a bank to its directors, or any of them, or upon paper upon which they are responsible, to an amount exceeding in the aggregate one third of the capital of the bank, contrary to a statute of New York, was held by the chancellor of that State sufficient to authorize him, at the instance of the bank commissioners, to grant an injunction against the bank, to appoint a receiver to wind up its affairs, and to decree its dissolution. For this purpose the acts of the officers were considered the acts of the bank, and their ignorance or neglect form no excuse for a violation of law. At the same time it was observed, that the mere act of the cashier of a bank, contrary to the express directions of the directors, and without their knowledge and acquiescence, in receiving payment for stock other than gold and silver and the notes of specie-paying banks, and thereby violating a law of the State, will not work a forfeiture of the charter.—*Bank Commissioners vs. Banks of Buffalo*, 6 Paige, 497; and see *Bank Commissioners vs. Rhode Island Central Bank*, R. I., 12.

This doctrine has been maintained and applied by the courts of New York in the construction of a statute of that State concerning manufacturing corporations, which provides that for all debts due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares or stock, and no further.—*R. L. N. Y.*, 247.

Under this statute, if a corporation, being indebted, suffer all its property to be sacrificed, and the trustees actually relinquish their trust, and omit the annual election, and do no one act manifesting an intention to resume their corporate functions, the courts may, for the sake of the remedy against the individual members and in favor of creditors, presume a virtual surrender of the corporate rights and a dissolution of the corporation.—*Slee vs. Bloom*, 19 Johns., 456, commented on in 2 Kent, Com., 311, 312; *Penniman vs. Briggs*, 1 Hopkins, 300, 8 Cowen, 387. And an election of trustees made after the insolvency of the company, for the mere purpose of keeping it in existence, will not prevent such dissolution.—*Penniman vs. Briggs*, 1 Hopkins, 300, 8 Cowen, 387; *Matter of Niagara Ins. Co.*, 1 Paige, 258. In these cases the courts of New York did not decide that the companies had lost all their rights, but that, even if they had a right to reorganize themselves, the case had happened in which, with regard to their creditors, they were dissolved.—*Slee vs. Bloom*, 19 Johns., 475, 476, per Spencer, J.; *Penniman vs. Briggs*, 1 Hopkins, 305, per Sandford, Ch., 2 Kent, Com., 311, 312. Vide also *Mickles vs. Rochester City Bank*, 11 Paige, 118; *Jackson Marine Ins. Co.*, 4 Sandf., Ch., 559.

A joint-stock company, completely registered, became bankrupt. One of the members of the company had previously been declared bankrupt, and had obtained his certificate. The master placed the bankrupt's name on the list of contributories, and calls were made by the master on him for contributions to discharge the liabilities

of the company incurred before his bankruptcy. Held, on his appeal, that his certificate was a bar to the liabilities to satisfy which the calls were made, and that the bankrupt's name ought to be removed from the list of contributories.—Chapple's Case, 17 Eng. Law and Eq., 516.

### DATES AND DEPOSITIONS.

SECTION 38. *And be it further enacted,* That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register in the manner provided in Section 4, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act; the proceedings in all cases in bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated. Evidence or examinations in any of the proceedings under this act may be taken before the court, or a register in bankruptcy, *viva voce*, or in writing, before a commissioner of the Circuit Court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the Circuit Court.

**Commencement of the Proceedings in Bankruptcy.**—The filing of the petition for adjudication in bankruptcy, either by a debtor on his own behalf, or by any creditor against a debtor, upon which an

order has been issued by the court, or by a register in the manner provided by the 4th Section, shall be deemed and taken to be *the commencement of the proceedings in bankruptcy under this act.*

This provision must be constantly borne in mind, because it has an important bearing in the administration of bankruptcy. The fraudulent preferences and conveyances, transfers, payments, and pledges, it will be remembered, are invalidated when made respectively within four months and six months before the filing of the petition by or against a debtor. It is, in fact, the landmark, in many instances, which must be ever kept in view.

The section then declares that the proceedings in all cases of bankruptcy are to be deemed matters of record, and prescribes the form in which they are to be recorded, kept, and numbered in the office of the clerk of the court, and the books which are to be kept open for public inspection.

Copies of such records, duly certified under the seal of the court, are in all cases to be admitted as *prima facie* proof of the facts therein stated.

Evidence and examinations, either of the bankrupt or other persons summoned in the course of the proceedings under the act, may be taken before the court or a register in bankruptcy, *viva voce* or in writing.

Such evidence or examinations may also be taken before a commissioner of the Circuit Court, or evidence may be taken by affidavit, or, when necessary, on commission.

The court has power to direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination; and the court has power to compel the attendance of witnesses, and the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the Circuit Court.

## INVOLUNTARY BANKRUPTCY.

SECTION 39. *And be it further enacted,* That any person residing and owing debts as aforesaid, who, after the passage of this act, shall depart from the State, district, or Territory, of which he is an inhabitant, with intent to defraud his creditors, or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal and remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer



of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory, within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force, and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or has been actually imprisoned for more than seven days in a civil action, founded on contract, for the sum of one hundred dollars or upward; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money, or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been com-

mitted. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

SECTION 40. *And be it further enacted,* That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted; and may also, by its injunction, restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any of the debtor's property not excepted by this act from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged bankrupt and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court. A copy of the petition and of such order to show cause shall be served on such

debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or if such debtor can not be found, or his place of residence ascertained, service shall be made by publication, in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication; and if such proof be not given on the return-day of such order, the proceedings shall be adjourned, and an order made that the notice be forthwith so served or published.

SECTION 41. *And be it further enacted*, That on such return-day, or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the facts of such alleged bankruptcy; and if, upon such hearing or trial, the debtor proves to the satisfaction of the court or the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed, and the respondent shall recover his costs.

SECTION 42. *And be it further enacted*, That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the

debtor. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order, or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory of his estate in the form and verified in the manner required of a petitioning debtor by Section 13. ¶ If the debtor has failed to appear in person or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause; and if the bankrupt is absent or can not be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain. If the petitioning creditor shall not appear and proceed on the return-day, or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

We now approach the consideration of the question, how a debtor may be compulsorily made a bankrupt. The answer to which is, by the commission of any one of those acts which this section denominates Acts of Bankruptcy. These acts we will now enumerate, dividing them into two classes:

1st. Those acts which are only acts of bankruptcy if done by the debtor with intent to defeat or delay creditors in the recovery of their debts, or with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the provisions of this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of the act, or to evade any of the provisions thereof.

2d. Those acts denominated acts of bankruptcy, the intent in the commission of which is immaterial.

*Intent* can be evidenced only by the debtor's acts or admissions. If a man admit that he committed the act with the intent of defeating or delaying his creditors in the recovery of their debts, it is almost conclusive evidence of it, and can scarcely be explained away. Any thing written or said by the debtor before his bankruptcy tending to show the tendency of an act equivocal in itself is admissible. So, if the act be accompanied by circumstances from which the intent may fairly be presumed, it will be sufficient. If the necessary consequence of the conduct of the debtor is that his creditors must be defeated and delayed, then his intent to do so may be fairly presumed. The various acts of bankruptcy being expressly defined by the act, and being in many instances penal in their operation, are not to be extended or enlarged by construction or implication. Where a presumption is raised by circumstances attending the act, it may always be rebutted by evidence showing that the debtor did not at the time entertain the intention imputed to him; some such instances will be found in the notes to this section.

The intention may be either inferred from the act itself, as a necessary consequence of it, or shown by other circumstances accompanying the act, or proved by the admissions of the bankrupt; and declarations made by the bankrupt may be given in evidence against him to prove such intention, though not contemporaneous with the commission of the act, if they are so connected with it as to form part of the *res gesta*.—Rouch vs. Great Western Railway Company, 1 Q. B., 57.

It must be remembered, that in order to establish a compulsory adjudication in bankruptcy, the act or acts of bankruptcy relied on must have been committed by the debtor *within six months* before the creditor applies by petition for the adjudication, or, to adopt the very words of the section, the petition must be brought *within six months* after the act of bankruptcy shall have been committed by the debtor.

It should be premised that there are very few decisions in the American courts upon the question of what amounts to an act of bankruptcy, and with the exception of the cases applying to fraudulent preferences, assignments and conveyances, which have been before noted by the author, he is unable, upon inquiry, to find any decision of the Federal or State Courts upon any of the other acts of bankruptcy which were enumerated in that act.

That act was in operation for so short a period that comparatively very few cases of compulsory bankruptcy came before the courts.

That able judge and eminent jurist, Mr. Justice Betts, Judge of the United States Court for the Southern District of New York, informed the author that, in the administration of the Bankrupt Law of 1841, over which he presided, very few cases of disputed adjudication occurred in his district. English decisions, therefore, upon the cognate questions arising upon the construction of this act, will be admitted as authorities. And the decisions under the act of 1841

which are reported upon the question of fraudulent preferences and conveyances arose where the order of Discharge was opposed, or where the assignees brought actions to recover back property so fraudulently assigned and conveyed under voluntary bankruptcy.

In this connection it may be well to state what were constituted acts of bankruptcy by the United States Bankrupt Act of 1841. They were all adopted from the English Bankrupt Act, 6th Geo. 4, c. 16, which act repealed all the previous English Bankrupt Acts, and were as follows:

1st. Departure from the State, District, or Territory of which the trader is an inhabitant, with intent to defraud creditors.

2d. Concealment to avoid being arrested.

3d. Willfully or fraudulently procuring himself to be arrested, or his goods and chattels, lands or tenements to be attached, distrained, sequestered, or taken in execution.

4th. Removal or concealment of goods, chattels, and effects to prevent their being levied upon or taken in execution, or by other process.

5th. Making a fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, chattels, credits, or evidence of debt.

We now consider in detail, and in the order of the enactments in the section, the various acts which will constitute

#### ACTS OF BANKRUPTCY.

*First.—Departing from the State, District, or Territory of which he is an inhabitant, with intent to defraud his creditors.*

The departure must be with *intent to defraud* his creditors. The words used in the latest English Bankrupt Act are, "If any trader liable to become bankrupt shall depart the realm with intent to *defeat or delay* his creditors;" and in the case of a person not a trader, the words used are, "If any person *not being a trader* shall, with intent to *delay* his creditors, depart the realm." The words *defraud* his creditors have never been adopted in any of the English bankrupt statutes. The departure from the State, district, or Territory with intent to defeat or delay creditors, would be cogent *prima facie* evidence of an intent to *defraud* creditors. An adjudication of bankruptcy can not be sustained where the departure was for a fair and proper purpose, and not with a view of defrauding and delaying creditors. Every man has the right to go abroad to look after his affairs, though his creditors may be thereby delayed.—*Ex parte* Mutrie, 5 Ves., 574; Warner vs. Baker, Holt, 175. The departure, with a consequential delay of creditors, is not an act of bankruptcy without proof, or necessary inference of an intention to delay creditors at the instant of departure.—*Ex parte* Osborne, 1 Rose, 387; 2 V. & B., 177.

It is now settled by the English decisions, that a departure of a debtor with an *intent* to delay his creditors is an act of bankruptcy, though no creditor be in fact delayed, Robertson vs. Liddell, 9 East., 487; Aldridge vs. Ireland, cited 7 Term. Rep., 512; Hawkins vs.

Lukin, cited in the last case; Cooke's Bank. Law, 4th edition, 74; and on the other hand, where the delay of creditors is the necessary consequence of the debtor's absenting himself, the departure then constitutes an act of bankruptcy. Vide 10 East., 418; Ramsbottom vs. Lewis, 1 Camp., 279. The intention may also be inferred from length of absence.—5 Jurists, 580. The departure of a debtor proved to be in embarrassed circumstances, though strong evidence of an intention to defeat and delay his creditors, is not always conclusive evidence of such intention. In some cases where the debtor had gone abroad under circumstances which rendered it highly improbable that he would return, as where he had committed a crime, it will be inferred that he must have intended to delay his creditors, such being the necessary consequence of his behavior.—Fowler vs. Padgett, 7 Term Rep., 509, where these cases are explained and the principle elaborately laid down.

A trader resident abroad, having come to England for a temporary purpose, commits an act of bankruptcy by leaving it to avoid a creditor.—Williams vs. Nunn, 1 Taunt., 270; S. C., 1 Camp., 152; Holroyd vs. Gwynne, 2 Taunt., 126. But if a trader depart with an honest intention compatible with business, he does not thereby commit an act of bankruptcy, unless the fear of arrest concur with the other motive to induce him to depart.—Warner vs. Barber, Holt, 175; Windham vs. Paterson, 4 Camp., 286. Where a trader appointed to meet A respecting some accounts in which B was interested, and failed to do so, but left this country for France, leaving a letter for B, in which he stated he should be back in ten days, and in the mean time would make proposals to his creditors; and on the following day he wrote another letter to B from Calais stating that the account current between them might be speedily settled; and a month afterward he wrote another letter from Paris stating that he was under the necessity of remaining in France, it was held, that the departing the realm and absence abroad being a continuous act, these letters were admissible in evidence, and sufficient to establish an act of bankruptcy, by showing the intent with which such trader departed.—Rawson vs. Haigh, 9 Moore, 217; 2 Bing., 99; 1 C. & P., 77; and see Bateman vs. Bailey, 5 T. R., 512.

Pressure of debts, though strong, is not conclusive evidence of an intention to delay creditors. If a trader go abroad, leaving a general power of attorney with his clerk to transact all his business for him, but provides no means of paying bills of exchange which fall due in his absence, he commits an act of bankruptcy.—*Ex parte* Hilner, 3 Mont. & Ayr., 722; 2 Deac., 324. If a trader, whose house of trade is in Ireland, comes to England on business, and again quits the country to avoid an arrest, it is a departing the realm with intent to delay his creditors sufficient to constitute an act of bankruptcy.—Williams vs. Nunn, 1 Taunt., 270; 1 Camp., 152. A trader who leaves England and proceeds to Ireland, where he carries on trade with an honest intention compatible with trade, does not thereby commit an act of bankruptcy.—Windham vs. Paterson, 2 Rose, 466; 1 Stark., 144. A voluntary departure for the shortest

time is sufficient, if done clearly with an intention to defraud creditors.—*Maylin vs. Eylve*, 2 Strange, 809. Compulsory absence, as where the debtor has been arrested, will not constitute an act of bankruptcy.—*Phillips vs. The Sheriff of Essex*, Green, 53. If a debtor leave his house on account of domestic dissensions, but gives no directions for carrying on his business, or makes no arrangements for meeting pressing liabilities which he must have known would accrue in his absence, and gives no explanation of such absence, this was held sufficient evidence of an act of bankruptcy.—*Holroyd vs. Whitehead*, 3 Camp., 530; 1 Marsh, 128. If a trader leave his house, and assigns as a reason for his departure to his clerk that he does so to avoid any altercation as to the state of his affairs, this has been held to be no act of bankruptcy.—*Ex parte Prater*, 4 Taunton, 603.

A debtor who had ordered large quantities of goods from several tradesmen without the means of payment, and after they were delivered secretly left her house in London without leaving word where she was to be found, and took lodgings in a remote country village, and remained there for some time, it was held, that this was a departure with intent to delay creditors, and an act of bankruptcy.—*Ex parte Birch*, 1 Mont., D. & D., 659. The intent to defraud creditors must be proved; but where the result of the absence is that creditors are in fact delayed, the burden of proof that such was not his intention is then upon the debtor.—*Ex parte Beer*, 1 Mont., D. & D., 390. Explanatory circumstances for the departure, the fact that the debtor intended to return, the object of his leaving, the fact that he made provision for liabilities maturing in his absence, and any other facts negating his intent to defraud his creditors, may be adduced by the debtor in rebuttal of the presumption that he committed an act of bankruptcy. The section requires a departure from the State, District, or Territory of which the debtor is *an inhabitant*, to make such departure an act of bankruptcy, and this must be strictly proved.

A departure from the debtor's residence or place of business in one city of a State to another, would not, it is presumed, within the words of the section, constitute an act of bankruptcy, unless he did so to conceal himself to avoid the service of legal process in an action for the recovery of a debt. Vide the *third* Act of Bankruptcy and notes.

A debtor being in embarrassed circumstances in England, left that country in June, 1831, for America, with some intention of returning, but did not return, and made no provision for the payment of all his debts, and in September, 1833, one of the creditors, whose debt was left unprovided for, issued a fiat in bankruptcy; on application to *supersede* without the bankrupt appearing to such fiat, it was held, that the continued absence of the bankrupt, under the circumstances, amounted to an act of bankruptcy.—*Ex parte Kirkman*, 3 Dea. & Chit., 451.

Some analogy may be found from the cases in which the Amended Code of Procedure of the State of New York authorizes warrants in cases of attachment to be issued.



The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keep himself concealed therein with the like intent, or that such corporation or person has removed or is about to remove any of his or its property from the State with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property with the like intent, whether such defendant be a resident of this State or not.

There was a similar provision in the Revised Statutes. The real and personal property of a debtor may be attached for the payment of his debts whenever such debtor, being an *inhabitant of this State*, shall *secretly* depart therefrom with intent to defraud his creditors, or to avoid the service of civil process, or shall keep himself concealed therein with the like intent.—2 R. S., p. 3, § 1.

The affidavit is to show that the defendant has departed from the State with intent to defraud his creditors, or to avoid service of a summons, or keeps himself concealed therein with a like intent.

The clause appears to imply residence or inhabitancy within the State, and then the code scarcely differs from the statute, except as to the secrecy of departure.

In *Castellanos vs. Jones*, 1 Selden, 164, the affidavit of the applicant stated that the said Rodriques was an inhabitant of this State, but that since the 14th of January inst. he has absconded or concealed himself to avoid service of civil process; that said Rodriques can not be found, and is not at his usual place of business; that deponent has tried to serve civil process upon him, but that he can not be found; that his sign has been removed from his store within the last two days, and that the person in charge refused to give any information as to where he was concealed or gone to.

The affidavits of two persons were annexed. The application was held defective on different grounds, and the affidavit verifying it and above set forth, was declared to fall short of stating the facts authorizing an attachment. Although it was stated that Rodriques was an inhabitant of the State, it did not affirm he had departed therefrom with intent to defraud his creditors, secretly or otherwise, or that he had departed therefrom to avoid the service of civil process, or that he kept himself concealed within the State with the like intent.

In *Vanalstyne vs. Erwine*, 1 Kernan, 331, under the Revised Statutes, the affidavit was in the disjunctive—that the debtor had departed from the State *or* was concealed within it, with an intent to defraud his creditors, the facts stated in the affidavits would sustain either aspect of the case. The case of *The People vs. The Recorder of Albany*, 6 Hill, 429, was cited to the point, that where the circumstances are such that it is doubtful in what particular the defendant's conduct has brought him within a statute, the creditor has

only to state all the facts, without electing which aspect he will adopt. The affidavit was held sufficient.

It has been held that, in order to obtain the warrant upon an attachment under the Code of Procedure in the State of New York, it is sufficient for the plaintiff to show that the defendant secretly departed the State. If he has departed with the intent specified, it is enough, though he went openly.—*Supreme Ct.*, 1850, *Morgan vs. Avery*, 7 Barb., 856.

Departing from the party's counting-house or place of business, although he have a place of business elsewhere, is an act of bankruptcy.—*Judine vs. Da Cossen*, 1 N. R., 234.

The departure must be voluntary, and not compulsory; for where a man is arrested, and thereby obliged to leave his house, such a departure is not an act of bankruptcy.—*Phillips vs. Essex, Sheriff*, 1 Cole, B. L., 85.

The distance that a person departs to after leaving his dwelling-house, or the length of time that he is absent from it, are perfectly immaterial, if the object be to delay his creditors. Where a trader went to a neighbor's house, and told him he expected every moment to be arrested, upon which he concealed himself, and desired his neighbors to watch, but returned home immediately the officer was gone, such temporary absence was held to be an act of bankruptcy.—*Chenoweth vs. Haley*, 1 M. & S., 676; *Bayly vs. Schofield*, *id.*, 338.

And if the party go to a distant place among strangers, it may be an act of bankruptcy, though he is visible there; and going only to the next house may also be the same, if he is not visible. Per *Buller, J.*, cited *Aldridge vs. Ireland*, cited 1 Taunt., 273.

Where a man rode out of town in order to avoid being arrested, and returned in the evening, and the next morning sent for the bailiff, and told him he went out in order to get the terms of the plaintiff, this was held to be such a departing from the dwelling-house as was sufficient to constitute an act of bankruptcy.—*Maylin vs. Eylve*, 2 Stra., 809.

And if a trader, on being applied to for payment by a creditor, leave his house under the pretense of getting money, but goes to a billiard-table, and remains there the whole evening, this has also been held an act of bankruptcy.—*Bigg vs. Schooner*, 851.

The departure must be with the *intention* to delay his creditors, and *seem* to delay them absolutely, and not merely in case a particular event should occur.—*Fisher vs. Boucher*, 10 B. & C., 705.

The intention may, as in other cases, be presumed as a necessary consequence of the party's act. When the departure is evidently for a laudable purpose, although creditors be delayed, it is not an act of bankruptcy, as leaving home to recover a debt, *Fowler vs. Padgett*, 7 T. R., 509; or to arrange with a creditor leaving word where he is gone, vide *Deffle vs. Desanges*, 8 Taunt., 671; 3 Moo., 7; or for any other lawful purpose, *Robertson vs. Liddell*, 9 East., 492; 4 Taunt., 603; or for avoiding altercation.

His declaration before leaving home has been admitted, *Smith vs. Cramer*, 1 N. C., 585, so, after his return home, assigning a rea-

son for his absence, *Bateman vs. Bailey*, 5 T. R., 512; *Ridley vs. Gyde*, 9 Bing., 349; and where it is proved that he said that he departed to avoid arrest, no proof of the writ, debt, or even of creditors, was required.—*Newman vs. Stretch*, Moo. & M., 838.

**Second.**—*Or being absent from the State, District, or Territory of which he is an inhabitant, remaining absent with intent to defraud his creditors.*

If a debtor depart from the State, District, or Territory, from a proper motive, but upon discovering an embarrassed state of his affairs he *remains absent* with intent to defraud his creditors, or to conceal himself from them, he commits thereby an act of bankruptcy; the length of absence is immaterial, the act is complete the moment the debtor leaves the State, District, or Territory, if the intention be apparent.—*Holroyd vs. Gwynne*, 2 Taunt., 176; 1 Rose, 113. Thus, although departing for legitimate and urgent reasons, if a debtor protracts his residence abroad for an unreasonable length of time, assigning no cause for his absence, leaving no funds, nor making any arrangements in the country he has left for the payment of his debts, it will be inferred that he remains absent with intent to delay his creditors.—*Ex parte Kilner*, 2 Deac., 326; *ex parte Rhodes*, 5 Jurist, 580; *ex parte Cohn*, 2 L. J., N. S., 90; 26 L. J. Bank, 83; 3 Jurist, 1141.

This provision, as will have been observed, was not contained in the former United States Bankrupt Act of 1841, nor was it in the earlier English Bankrupt Acts; it has been adopted from the recent English act consolidating the Bankrupt Law.

The intention of the party in delaying his creditors must be proved in the same manner as already noticed. A trader protracting his residence abroad for an unreasonable length of time, without assigning a sufficient cause for his absence, or leaving funds, or making other arrangements here for the payment of his debts, is *prima facie* sufficient evidence of intention, Deac., 47, though he may have been pursuing his regular course of business, and remained away only three years.—*Ex parte Rhodes*, 5 Jur., 580, Ch.

**Third.**—*Concealing himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act.*

A debtor concealing himself, if he did not thereby prevent the service of process, would seem not to have been a complete act of bankruptcy upon the construction of the former Bankrupt Act of the United States of 1841.—*Barnes vs. Billington*, 1 Wash., C. C., 29; 4 Day, 81, note. But the author ventures to suggest a doubt upon the correctness of this decision. If it were proved that the sheriff or other officer really had the necessary legal process to serve upon the debtor, and the debtor, with the intent of avoiding such service, concealed himself, the act of bankruptcy would be complete, although the fact of such concealment was not the proximate cause of the non-service of such process. The intent of the debtor is the question in cases of the commission of acts of bankruptcy of this character. The act of concealment must be to avoid the service

of legal process for the recovery of a debt or demand *provable* under the act.

Where a debtor conceals himself, either in his own house or elsewhere, or departs from his house under the apprehension that he may be arrested, he thereby commits an act of bankruptcy; and it would seem that he does so, even though such apprehension should be groundless, *ex parte* Bamford, 45 Ves. Jr., 447; Newman vs. Stretch, M. & M., 330, and no one called during his absence, Hammond vs. Hicks, 5 Esp., 139; Wydown's Case, 14 Ves., 86.

The intention in all these cases must govern the act; thus where a trader went to his neighbor and told him he expected to be arrested, and while he remained there was informed that a sheriff's officer was going toward his house, upon which he concealed himself in the back room, and desired the neighbor to watch, and when told the officer had gone past his house and had left the street, immediately returned home, it was held, that this was an act of bankruptcy, as an absenting himself to delay creditors, Chenoweth vs. Hay, 1 M. & S., 676; 2 Rose, 137; 6 Taunt., 540; and would clearly be within the operation of this act. Again, where there were two partners, one of whom resided at Manchester and the other in London, and the London partner having left his own house without intent to delay his creditors, and having been a few days on a visit to Manchester, both of them left the house of business there to avoid an arrest, at the same time carrying their books of account with them, it was held, that they both thereby committed an act of bankruptcy.—Spencer vs. Billing, 3 Camp., 314; 1 Rose, 362. So a debtor, being arrested, escapes from the officer into a neighbor's house, and when the officer inquired for him there he was denied, and the door fastened against him; and while there the trader declared that he remained there, not so much on account of the officer, for that debt was really paid, but for fear of other creditors, and when it became dark he went home; this was held to be an absenting or concealing himself, and an act of bankruptcy.—Bayly vs. Schofield, 1 M. & S., 338.

And where a trader who has no settled house, but takes up a temporary abode at an inn or public-house, by departing therefrom to avoid being arrested, he thereby commits an act of bankruptcy.—Holroyd vs. Gwynne, 9 Taunt., 176; 1 Rose, 113. Where creditors called upon a trader, and he admitted and spoke to them, and pretending to go out for money to pay them, left his house and did not return until he knew they were gone, it was held, that he thereby committed an act of bankruptcy.—Bigg vs. Spooner, 2 Esp., 651. And declarations by a bankrupt of his motives for concealing himself made at the time, is evidence against him to prove the act of bankruptcy.—Bateman vs. Bailey, 5 T. R., 512.

But the declarations of a debtor made shortly *after* an absence, are not admissible to prove such absence an act of bankruptcy.—Lees vs. Marton, 1 M. & Rob., 210.

So also where a debtor had been absent, and on his return made a declaration that he had concealed himself to avoid a writ against

him, this is sufficient evidence of an act of bankruptcy without any other proof of the existence of the writ, or of the debt on which it was founded.—*Newman vs. Stretch, M. & M., 338.* And it would not be necessary to show that a writ had been actually sued out against a debtor who concealed himself to avoid an arrest, the act of concealing with such intention would be sufficient.—*Wilson vs. Norman, 1 Esp., 334.* Whether the concealment took place with the intent necessary to constitute it an act of bankruptcy must, in such cases, be determined by the circumstances under which it took place, which is a question of fact for a jury to decide upon.—*Aldridge vs. Ireland, 1 Taunt., 273, n.; 3 Doug., 397.*

Thus where a debtor, in embarrassed circumstances, absented himself from his house from the 16th of February till the 9th of March, upon an issue whether he had committed an act of bankruptcy on or before the 5th of March, two letters written by him on the 16th of January preceding, asking for extension on two bills of exchange payable by him, were admitted in evidence to show the motive of his absence.—*Smith vs. Cramer, 1 Scott, 541; 1 Hodges, 124.*

So also where a debtor, in embarrassed circumstances, sent a letter from his country house to his son, who resided at his place of business in town, stating that he was unable to meet his engagements, and desiring that he might be denied to any creditor that might call, and thereupon left his home, and did not return during the whole of that and the following day; upon an issue directed to try whether an act of bankruptcy had been committed, a witness proved that the trader called at her brother's house in London on the day in question, and expressed an apprehension of being sent to prison; that he was in no hurry to get home, as he was fearful his creditors would lay hold of him, and he did not leave till dark; it was held, that this was concealing himself, and was an act of bankruptcy.—*Johnson vs. Woolf, 2 Scott, 372.* The debtor must conceal himself to avoid the service of legal process, not merely to avoid the meeting a creditor. The decisions above cited were, some of them, upon the words of the English Bankrupt Act, "otherwise absent himself," which are not in this act, but they will afford some rule of construction, and are in many respects *in pari materia*. For instance, upon an application for an attachment under the Code of Procedure in the State of New York, where a defendant, becoming aware that he must fail, during business hours withdrew from his place of business to a tavern in another part of the city, and remained there till midnight, meanwhile occupied in preparing payments for preferred creditors, and in making a general assignment. He communicated his place of resort only to his counsel and a friend, and the friend on meeting an officer denied that he knew where he was. It was held, that these facts were sufficient evidence of a concealment with intent to avoid service of summons.—*Supreme Ct., 1851; Genin vs. Tompkins, 12 Barb., 265.*

It was also in the same case held, that where the attachment was sought on the ground of an intention on the part of the debtor to

avoid the service of process, that it was not necessary to show that a summons had been actually issued, and an attempt to serve it made.

The act of bankruptcy now treated of, it will be observed, is not founded upon an alleged departure of the debtor from the State, District, or Territory in which he resides, with an intent to delay or defraud creditors, but upon a concealment within the State, or in any place where legal process can be lawfully served upon him, and the intent is to avoid the service of such legal process.

It will probably be sufficient to prove that the debtor who intentionally so disposes of himself with a view to avoid such service, and has an actual intention at the time to do so; for it is laid down in all the decisions upon this question of intent, that men are supposed to intend what must be the natural and necessary consequences of their acts. It is a concealment to avoid service of the summons, no matter for what length of time; no matter if with a view to make a disposition, even lawful, of his property; the placing himself designedly so that his creditors can not reach him with process, which is the concealment contemplated in the act. The question seems to be, Did the defendant conceal himself, even temporarily, with the purpose of avoiding service of the summons?

*Fourth.—Concealing or removing any of his property to avoid its being attached, taken, or sequestered on legal process.*

The concealment of goods, distinct from a fraudulent conveyance of them, must be actual, not constructive, and by the bankrupt himself, or by his procurement, while they continued to be in his intention his own goods, in order to constitute an act of bankruptcy.—*Livermoor vs. Bagley*, 3 Mass., 487.

This act also depends upon the *intent* with which it is done. The concealment must be with the intent to prevent the property being attached, taken, or sequestered on legal process. As in the other acts of bankruptcy declared by the section depending upon *intent*, the debtor may rebut any evidence raised by evidence explanatory of his conduct in the transaction.

To establish this act of bankruptcy, it should be proved that there is legal process existing and in force by which the debtor's goods could have been attached, taken, or sequestered.

The concealment or removal of property must be construed to mean any property in the debtor's possession and to which he claimed title, even if his title should be imperfect or clearly bad. If the debtor has removed or concealed any part of his property to avoid its being seized under legal process, it will constitute under this section an act of bankruptcy. From a removal of any part or portion of his property with such an intent, it may reasonably be inferred that he intended to extend the offense as far as might be necessary to promote his fraudulent designs.

As to what amounts to a concealment by a debtor, or a removal of his property, the decisions in the State Courts under provisions of a similar character to those of this act will present analogies. The mere naked fact of a removal of property from its place of

location, or from the business premises of the debtor, will not be sufficient to constitute an act of bankruptcy. The intention to defraud the creditor by withdrawing the property beyond the reach of the attachment or execution must be clearly established.

*Fifth.—Making any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors.*

The effect of this enactment is to make all assignments, gifts, sales, conveyances, or transfers of the debtor's estate, rights, or credits made by the debtor with intent to delay, defraud, or hinder his creditors, an act of bankruptcy.

We have treated of fraudulent preferences and conveyances made by the bankrupt in contemplation of bankruptcy fully in the notes to Section 35, and to some extent in those notes upon the question as to what assignments and conveyances by the debtor, void under the Statutes of Elizabeth and at common law, may amount also to fraudulent preferences and conveyances in contemplation of bankruptcy.

This section, however, by enacting that any assignment, etc., made with intent to delay, defraud, or hinder creditors, is to constitute an act of bankruptcy, opens out a very wide question, as it includes all conveyances and assignments void under the Statutes of Elizabeth which have been adopted in the various States of the Union as part of their common law, and also the statutes of the various States made against fraudulent assignments.

Any assignment, gift, conveyance, sale, or transfer of the debtor's property, void either at common law or by the law of the State in which it may be made, when so made with intent to delay, defraud, or hinder his creditors, is by this act constituted an act of bankruptcy.

The words of the Statutes of Elizabeth are embodied in the enactment, which must thus receive the same construction as the Statutes of Elizabeth themselves, and the State laws in which their provisions are embodied, have received from the courts.

Within the compass of this treatise it will not be expected that any more than the leading authorities on this question should be cited. It will be sufficient to state that any assignment, conveyance, or transfer, which is void by those statutes where they form part of the common law of the State, or void by the statutes of any State against fraudulent assignments in force at the time, will, when made by a debtor, amount to an act of bankruptcy.

It will be necessary, therefore, to review, as briefly as is consistent with clearness, the legal principles which regulate and control these transactions, and to refer to some of the decisions upon the question of fraudulent assignments and conveyances.

Where it is attempted to invalidate a transfer of goods by showing it to fall within the provisions of 13 Eliz., c. 5, a question arises proper for the consideration of a jury, who are to say whether the transaction was *bona fide*, or a contrivance to defraud creditors.

Where a bill of sale of chattel property is executed by a debtor to his creditor, purporting to convey the property to the vendee immediately, yet the vendor is after its execution suffered to remain in possession, a very strong presumption of fraud arises; for, as Lord Coke remarks in *Twyne's case*, continuance in possession by the donor is a sign of trust for his benefit, and therefore, in *Edwards vs. Harben*, 2 Term, 587, where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, and in the mean time the debtor died, whereupon the creditor took and sold the goods, he was held liable to be sued as *executor de son tort* for the debts of the deceased. Vide *Shears vs. Rogers*, 3 Barnwell & Adolphus, 383. Indeed, in *Edwards vs. Harben*, the court went so far as to say, "This has been argued as a case in which the want of possession is only *evidence* of fraud, and that it was not such a circumstance, *per se*, as to make the transaction fraudulent in point of law. That is the point we have considered, and we are all of opinion, that if there be *nothing but the absolute conveyance without the possession*, that in point of law is fraudulent." Lord Ellenborough thought "that if the vendor remained in possession of the goods after the sale thereof, the case was not bettered by the vendee's remaining in possession along with him;" and therefore, in *Wardell vs. Smith*, 1 Campbell, 333, where the action was brought against the Sheriff of Middlesex for a false return to a writ of *fiery facias* sued out by the plaintiff against John Mason, and returned by the sheriff *nulla bona*, and upon the trial it appeared that Mason had, before the issuing of the *fiery facias*, assigned all his effects to a creditor, whose servant was immediately put into the house, and remained conjointly with Mason, Lord Ellenborough directed a verdict for the plaintiff, saying, "To defeat the execution there must have been a *bona fide* substantial change of possession. It is a mere mockery to put another person in to take possession jointly with the former owner of the goods."

However, though in *Edwards vs. Harben* it was laid down, in the express terms above stated, that an absolute sale without delivery of possession was in point of law fraudulent, the tendency of the courts has lately been to qualify that doctrine, and leave the whole circumstances of each case to a jury, bidding them decide whether the presumption of fraud deducible from the absence of a transmutation of possession shall prevail. And, indeed, it ought to be remarked that, even in *Edwards vs. Harben*, the words of Buller, J., were, "If there be *nothing* but an absolute conveyance without the possession, that in point of law is fraudulent;" by which his lordship may have intended, that where there was nothing, i. e., no facts whatever appearing in the case except the absolute conveyance and the non-delivery, that then the inference of fraud would be so strong that a jury ought not to resist it. But it is very different in cases where, although the conveyance is absolute, and the possession has not passed, still there are surrounding circumstances which show that a fraud may not have been intended; in such



cases it can not properly be said that there is "*nothing but an absolute conveyance without the possession.*" Therefore, in *Latimer vs. Batson*, 4 Barnwell & Cresswell, 652, where the sheriff seized the goods of the Duke of Marlborough, and sold them to the judgment creditor, who sold them to the plaintiff, who put a man in possession, but allowed them to remain in the duke's mansion and be used by him as before, it was held, that it was properly left to the jury to say whether the sale was a *bond fide* sale for money paid by the plaintiff; and that if so, they should find a verdict for him.

Here the goods had been seized by the sheriff, who is a public officer, and his seizure a public act, so that the transaction was accompanied with some notoriety; and as the secrecy of the transfer is a badge of fraud, so is the notoriety of the transfer always a strong circumstance to rebut the presumption thereof. Vide *Latimer vs. Batson*; *Leonard vs. Baker*, 1 M. & S., 251; *Watkins vs. Birch*, 4 Taunt., 823; *Jezeph vs. Ingram*, 8 Taunt., 838; *Kidd vs. Rawlinson*, 2 B. & P., 59; *Cole vs. Davies*, 1 Lord Raym., 724; *Macdona vs. Swiney*, 8 Irish C. L. Rep., 73.

It may, therefore, be safely laid down that, under almost any circumstances, the question, *fraud or no fraud*, is one of the considerations for the jury. Vide the judgments in *Martindale vs. Booth*, 3 B. & Ad., 498, where several cases establishing this point are cited; and see in *Carr vs. Burdiss*, 5 Tyrwh., 316, the expressions of Park, B.; *Dewey vs. Bayntun*, 6 East., 257; *Reed vs. Blades*, 5 Taunt., 212, and per Tindal, C. J., *Lindon vs. Sharp*, 6 Mann. & G., 898; 7 Scott, N. R., 730, S. C.; *Pennell vs. Dawson*, 18 C. B., 355. So in Chancery there are no rules establishing particular circumstances to be indelible badges of fraud; but the question of *bond fides* is there also one of fact.—*Hale vs. The Metropolitan Omnibus Co.*, 28 L. J., 777.

The above observations apply to cases where the consequence is absolute, and there is no transmutation of possession; but where the conveyance is not absolute to take effect immediately, as, for instance, where it is by way of mortgage, and the mortgagee is not to take possession till a default in payment of the mortgage money, there, as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to be no evidence of fraud.

"We consulted," says Buller, J., in *Edwards vs. Harben*, "with all the judges, who are unanimously of opinion, that unless possession *accompanies and follows* the deed, it is fraudulent and void. I lay stress on the words *accompanies and follows*, because I shall mention some cases where, though possession was not delivered at the time, the conveyance was held not to be fraudulent." And then his lordship proceeds to point out the distinction between "deeds or bills of sale which are to take place immediately, and those which are to take place *at some future time*"; for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as *accompanying and following*

*the deed.*" Vide *B. N. P.*, 258, and *Cadogan vs. Kennett*, Cowp., 436; *Munshull vs. Lloyd*, 2 M. & W., 450. This doctrine was affirmed and acted upon in the late case of *Martindale vs. Booth*, 3 B. & Ad., 505; and in *Reed vs. Wilmot*, 7 Bing., 577; also per *Tindal, C. J.*, *Reeves vs. Capper*, 5 Bing., N. C., 140.

Cases may, and probably will arise, in which it may be attempted to take advantage of this doctrine for the purposes of fraud, by introducing terms consistent with the continuing possession of the vendor into deeds really intended not to operate as a *bona fide* transfer of property, but to inure for the vendee's protection.

In such a case, however, the collusion, as soon as discovered, would be held to invalidate the deed as much as if the conveyance purported upon the face of it to be absolute; for the presence or absence of fraud depends on the motives of the party making the conveyance.—*Nunn vs. Wilson*, 8 T. R., 521; *Riches vs. Evans*, 9 C. & P., 640.

Thus in cases of secret transfer not impeachable on the ground of fraud or want of consideration, the 13 Eliz., c. 5, left the creditor liable to incur a loss by trusting to the false appearance of ownership which the debtor's continuance in possession presented.

In the event of bankruptcy and insolvency, this defect in the law has been remedied by later English statutes, which vest in the assignees, upon order of the court, all goods which, by consent and permission of the true owner, are in the debtor's possession, order, or disposition at the time of his bankruptcy or arrest, and of which he was then the reputed owner.—12 & 13 Vict., c. 106, § 125; 1 & 2 Vict., c. 110, § 57. See *Heslop vs. Baker*, 8 Ex., 411; *Quartermaine vs. Bittleston*, 13 C. B., 153; *Hamilton vs. Bell*, 10 Exch., 545; and *Reynolds vs. Hall*, 4 H. & N., 519. But in general the secrecy of the transfer was not absolutely fatal to its validity until the 17 & 18 Vict., c. 36, "An act for preventing frauds upon creditors by secret bills of sale of personal chattels." The provisions of this important enactment extended to all bills of sale made after passing of the act, that is to say, after the 10th of July, 1854, whether they be absolute or conditional, or subject or not subject to any trusts, and which empower the grantee to seize or take possession, either with or without notice, immediately or at a future time, of any property or effects comprised in the act. Under the term "bill of sale," this act includes assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels; and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt." But it does not extend to assignments for the benefit of creditors, marriage settlements, see *Foster vs. Fowler*, 29 Law J., Q. B., 210; transfers of ships, transfers of goods in the ordinary course of business of any trade or calling, or bills of sale of goods in foreign parts or at sea; bills of lading, delivery orders, or any other documents used in the ordinary course of business, as proof of the possession or control of goods. Under the term "personal chattels," the statute comprehends goods, furniture, fixtures, see *Waterfall vs. Penistone*, 6 E.

& B., 876, and other articles capable of complete transfer by delivery; but not chattel interests in real estate or shares in government securities, or in incorporated or joint-stock companies, chosen in action, or stock and produce not removable from any farm or lands either by reason of a contract or a custom.

There are some cases—that, for instance, of the sale of a ship at sea—in which an actual delivery being impossible, no presumption of fraud can possibly arise from the substitution of one merely symbolical.—*Atkinson vs. Maling*, 2 T. R., 472. In the case of British ships, notoriety of transfer is to a certain extent secured by the Merchant Shipping Act, 1854, the 17 & 18 Vic., c., 104, which requires that when any registered ship, or any share in her, is disposed of to persons qualified to be the owners of British ships, the transfer must be made by bill of sale, which must contain a description of the ship, and must be registered according to the provisions of that act.—See §§ 55 & 57, and the 18 & 19 Vic., c. 91, § 11.

It will be observed that the Statute of Elizabeth only declares the fraudulent conveyance to be void, “as against that person, his heirs, and successors, executors, etc., who are or might be in any wise disturbed, hindered, delayed, or defrauded.” Such a conveyance is good as against the party executing it, *Robinson vs. McDonnell*, 2 B. & A., 134, and also as against any other person privy and consenting to it, *Steel vs. Brown*, 1 Taunt., 381; *Alliver vs. King*, 25 Law J., Cha., 427, and as against strangers other than creditors or *bond fide* purchasers for valuable consideration.—*Bessey vs. Windham*, 6 Q. B., 166; see, as to question of evidence raised, the latter case; *White vs. Morris*, 11 C. B., 1015. If, before the conveyance is avoided, the transferee assigns the goods, with the assent of the original owner, to a *bond fide* purchaser for value, the transfer is valid against creditors.—*Morewood vs. The South Yorkshire Railway Company*, 3 H. & N., 798. A sham transfer, for the purpose of defrauding creditors, has been held not to pass the property in the goods even as between the debtor and his confederate.—*Bowes vs. Foster*, 2 H. & N., 779.

Where a portion of the property of a debtor was under attachment at the suit of a creditor, and another creditor executed to the attaching creditor his bond conditioned for the payment of the debt, and thereupon the attachment was released, and then the debtor executed to the second creditor a general assignment of all his property to secure a debt due to him, and also to secure him for so giving his bond to the attaching creditor, and for the benefit of his other creditors generally, but creating preferences in favor of some of them, it was held that this was both an act of bankruptcy within the meaning of the Bankrupt Act and a giving an unlawful preference.—*Gassett vs. Morse*, 21 Ver., 6 Washb., 627.

A manufacturer assigned all his machinery, by way of mortgage, to secure the amount of certain bills drawn by him and accepted by the consignees of his goods, which had been discounted by the mortgagee, and also of such other bills as should from time to time be discounted in like manner. The mortgagee was empowered,

after three days' notice, to enter and take possession of all the machinery, and after a sale of the same, to pay the amount of the expenses and the bills then due or running, and to pay the surplus to the mortgagor. At the time of the execution of this deed the machinery was worth £1500, and the mortgagor's property consisted of goods £1100, and good debts £900, while his whole liabilities were £2900. Held, that this deed was no evidence of an act of bankruptcy; although, had it been acted upon, the mortgagor could not have carried on the particular business in which he was engaged.—*Young vs. Ward*, 14 Eng. Law & Eq., 403.

The dissolution of copartnership, and assignment by one partner to the other of all the property of the former in the firm, is not of itself an act of bankruptcy, but it would be if made as a mere cover to conceal actual or legal fraud, or with intent to give an advantage to any one.—*Ex parte Shouse*, *Crabbe*, 482.

A and B, partners, made a voluntary assignment of all their property for the benefit of their creditors without preference; and a few days after each presented a petition for the benefit of the Bankrupt Law. Six months before, one of them, in the name of the firm, wrote to their consignee in Rio, "The object of this letter is to request you to ship \$10,000 under cover to R D G, as he is our indorser, and under the Bankrupt Law this is the only way we can secure him." The request was not complied with. The court held that this "transfer" was made in contemplation of bankruptcy, and for the purpose of giving a preference to an indorser over other creditors, and refused to grant a Discharge. The petitioners demanded a jury, and they, by their verdicts, found the bankrupts were entitled to their discharges.—*Ex parte Garwood*; *ex parte Potts*; *Crabbe*, 496.

If a trader raises money by selling his goods at an under value (in contemplation of stopping payment and for the purpose of cheating his creditors) to one who has notice, either by express information or from the nature of the transaction, that he is selling his goods with a fraudulent intention, the sale is an act of bankruptcy and void, and the assignees may recover the goods from the purchaser.—*Fraser vs. Levy*, 6 Hurl. & Nor., 16.

A bill of sale made by a trader to secure future advances only, and executed *bonâ fide*, is not, in point of law, an act of bankruptcy, although it transfers all the stock in trade; and no intention to defeat or delay creditors can be inferred from it, although it operated by way of mortgage, and the property assigned was disproportioned in value to the amount advanced.—*Bittleston vs. Cooke*, 36 Eng. Law & Eq., 97.

A trader, indebted to several creditors in a sum sufficient to form a petitioning creditor's debt, caused his goods to be taken in execution by the plaintiff, another creditor, with intent to defeat or delay his creditors, and by way of fraudulent preference, after which the defendants distrained them for rent while on the trader's premises. The trader subsequently filed a declaration of insolvency, and on this fiat was awarded before the Bankrupt Law Consolidation Act

of 1849 came into operation, and he was adjudged bankrupt on his own petition, under the 7 & 8 Vic., c. 96, § 41. The plaintiff then sued the defendants for maliciously distraining for more rent than was due, and for taking an excessive distress, etc. After the commencement of the action, the assignees gave notice to the plaintiff that they elected to treat the execution as void; and they also gave notice to the defendants, claiming the goods taken under the distress. Held, that as the fiat and adjudication proceeded on the bankrupt's own petition, the title of the assignees could not relate further back than to the act of bankruptcy on which the fiat proceeded, namely, the declaration of insolvency, and, therefore, that it did not relate back to the fraudulent execution; but that the case would have been otherwise had the fiat been obtained on the petition of the creditors, and possibly so if the adjudication had proceeded on their petition, though the fiat had issued on the petition of the trader.—*Stevenson vs. Newenham*, 16 Eng. Law & Eq., 258.

The importance of the question the author is now annotating in the administration of this act in the various States, where assignments of this character prevail to a great extent, has induced him to present a summary of the decisions in each State upon the subject, and it is hoped that the labor will be repaid by the convenience of reference which is thus afforded to the practitioner.

In Alabama it has been held, that the 2d Section of the Alabama Statute of Frauds, in declaring that every gift, etc., of lands, etc., had or made, etc., "to the intent or purpose to delay, hinder, or defraud creditors, shall be utterly void," etc., is declaratory of the common law, and does not derive additional potency from the insertion of the word "purpose;" that word might be omitted, and still the same meaning would be accorded to the act.—*Anderson vs. Hooks*, 9 Ala., 704.

In Alabama a conveyance colorable and fraudulent as to part is void as to the whole of the property conveyed by it so far as creditors are concerned. When part of the consideration of such a conveyance is the payment of prior encumbrances upon a part of the property conveyed, the mortgagee is not entitled to be reimbursed for these, as the fraud vitiates the whole consideration.—*Tickner vs. Wiswall*, 9 Ala., 305.

An insolvent debtor is not allowed to appropriate the proceeds of his labor to investments in real estate for the advancement or in the name of his children; and if he procures a conveyance to be made to a child under such circumstances, the estate may be reached by an execution creditor.—*Patterson vs. Campbell*, 9 Ala., 933.

A being largely indebted, and having taken judgments that had been rendered against him to the Supreme Court for delay merely, executed to B a deed of trust to secure the payment of a debt of one hundred and fifty dollars due by him to C, and to indemnify C and another as his sureties on certain debts, some of which were due, and others running to maturity. The property conveyed was of much greater value than the aggregate of the debts intended to be secured, and consisted of land, slaves, horses, cattle, cotton, lum-

ber, household and kitchen furniture, and a stock of goods, together with all the debts due the grantor by note or account, and amounting to more than seven thousand dollars. The deed provided that A should remain in possession of all the property both real and personal, including the debts, and take the profits thereof to his own use, until default should be made in the payment of the debt due to C, or until C and his co-surety should be compelled by law to pay any of the debts for which they were bound; upon the happening of either of which contingencies B was authorized to sell for cash all or as much of the property as might be sufficient, first giving twelve months' notice of such sale, and from the proceeds to pay the debt due to C, or such part thereof as remained unpaid, and also such sums as C and his co-surety, or either of them, had been compelled to pay, and the surplus, if any, after defraying the expenses incurred in the execution of the trust, was to be paid over to A, the grantor. Held, that the deed, as against the creditors of A, was fraudulent and void on its face.—Johnson vs. Thweatt, 18 Ala., 741.

A voluntary conveyance, as against existing creditors, is absolutely void; but to avoid it, as against subsequent creditors, it must be shown to have been made with a fraudulent intent.—Stiles vs. Lightfoot, 26 Ala., 443.

In Arkansas it has been decided that a voluntary conveyance made in fraud of the rights of creditors is valid between the parties; and, therefore, he who accepts of a conveyance of a slave to him by deed, as trustee of another, can not set up a claim to it as his own.—Anderson vs. Dunn, 19 Ark., 450.

Where an absolute conveyance by a debtor who is insolvent, and who has been frequently sued, of all his real and personal property to his son, who was a young man without means or property, and at the time a member of his family, no consideration being paid at the time nor secured, and the grantor remaining in possession, is a conveyance having attached to it unmistakable badges of fraud, such as in the Court of Chancery would be conclusive evidence of a fraudulent intent to hinder and delay creditors.—Ringold vs. Waggoner, 14 Ark., 69.

In California it has been held, that a voluntary conveyance, as from a father to an infant son, though alleged to be in consideration of services rendered, is fraudulent in favor of creditors if the donor, as a reasonable man, ought not to have made the gift, and in fact is insolvent if the conveyance be sustained.—Swartz vs. Hazlett, 8 Cal., 118.

A confession of judgment to a *bond fide* creditor made without his knowledge, and the issuing of an execution and making levy under it by the judgment debtor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, are void as to him.—Ryan vs. Daly, 2 Cal., 238.

In Connecticut it was held, that a voluntary conveyance, to defeat a claim of a third person to damages for tort, is void at common law as against such third person.—Fox vs. Hills, 1 Conn., 295.

In Florida the Statute of 13 Elizabeth, protecting creditors and others from fraudulent conveyances, is to be construed literally in favor of the class of persons designed to be protected from the fraud. A surety is a creditor of the co-obligor, and, as such, is entitled to the protection of the statute.—*Gibson vs. Love*, 4 Florida, 217.

The Statute of 27 Elizabeth, though in its terms it applies only to land, yet, being declaratory of the common law, may be interpreted as defining the nature and effect of fraudulent conveyances generally.

What is termed fraud in law is distinct from fraud in fact, and it is the duty of a judge to instruct the jury that their conclusions from facts must be regulated by the character and import given to these facts by necessary legal implication. Where the legal effect of a conveyance is to hinder, delay, and defraud creditors, no matter what the actual intention may have been, it is a fraud in law, and the courts are bound so to declare it. *Vide case last cited.*

A creditor must establish his debt by judgment before he can raise the question of the validity of a conveyance made by his debtor.—*Carter vs. Bennett*, 4 Florida, 283.

In Georgia it has been held, that where B executed a deed of assignment of his property to A for the benefit of certain creditors, which was void by the act of 1818, and subsequently executed a mortgage of the same property to secure the payment of a *bond fide* debt, the mortgagees, as creditors, might avoid the first conveyance, and have the proceeds of the property mortgaged applied to the payment of their mortgage debt; and that, as against them, the first conveyance was in law a nullity.—*Lee vs. Brown*, 7 Geo., 275.

An assignment of the assets of a bank, insolvent at the time, and about making a general assignment, and against which proceedings are pending to revoke its charter, made to a creditor cognizant of these facts, and by collusion with him to defraud the other creditors, is void, and the assets so assigned to him are a trust fund to be applied to the payment of the debts of the corporation.—*Hightower vs. Mustian*, 8 Geo., 506.

To make a voluntary settlement void under the Statute of 27 Elizabeth, c. 4, it must be *covinous* and fraudulent, and not voluntary only.—*Clayton vs. Brown*, 17 Geo., 217.

As to retaining possession in Georgia, *vide Howland vs. Dews*, *Charlt.*, 386; *Foster vs. Wallace*, 2 *id.*, 231.

In Illinois, where debtors who are insolvent, and pressed for payment, convey all their real and personal estate to a brother of one of them (after having recently before secured certain creditors by mortgage) in consideration of five several promissory notes, payable in two, three, four, five, and six years from date, the consideration in the deed for the real estate being only one dollar, with an understanding that the assignee, at his discretion, shall apply the proceeds of the whole estate toward liquidating the demands against the assignors, such a transaction will be condemned as a legal fraud.—*Nesbitt vs. Digby*, 13 Ill., 387.

J conveyed lands to B to defraud creditors, which B for the same object conveyed to W, taking from him a written agreement to reconvey them to J. While in B's possession they were levied upon by N, a creditor of J. J executed a release to W, who reconveyed to B without consideration, and B, subsequent to N's levy, conveyed a portion to S. Held, that B's title was not strengthened by the conveyance from W, because the conveyance from J to B was complete as to J, but void as to his creditors, and N, whether his debt occurred prior or subsequent, is entitled to have the fraudulent conveyances set aside; and that S, having purchased after the filing of the certificate of levy by N, had notice of N's rights, and can not be protected.—*Brown vs. Niles*, 16 Ill., 385. As to retaining possession in Illinois, see *Thornton vs. Davenport*, 1 Scam., 296.

As to retaining possession in Indiana, see *Watson vs. Williams*, 4 Blackf., 26; *Case vs. Winshop*, *id.*, 475.

In Kentucky, if a man makes a bill of sale of slaves which is fraudulent and void as to creditors, and afterward goes to another State and dies domiciled there, and the vendor asserts no claim to the slaves, they will be assets in the hands of an administrator in Kentucky, if any, and, if there is no administrator, they will pass like lands to an heir or devisee. But if a purchaser claims the slaves, though his bill of sale may be fraudulent as to creditors, the law of the foreign domicile will not apply; and neither a foreign executor or an administrator can claim them; for the bill of sale good against the vendor will be equally conclusive against his representatives.—*Warren vs. Hall*, 6 Dana, 450. Two slaves were sold under execution upon credit, and purchased upon a *bond fide* judgment creditor of the same debtor, not plaintiff in either execution, who, in pursuance of a previous agreement between him and debtor, who was entirely insolvent, conveyed them to him in trust for his children. The debtor, in pursuance of the said agreement, furnished the sale money before it was due, but as payment upon the purchaser's judgment against him. Held, that these circumstances were sufficient to justify a finding that the conveyances were fraudulent, and that the slaves were subject to executions against the debtor upon judgments recovered before these occurrences.—*Clarkson vs. White*, 81 Dana, 11.

In Louisiana a conveyance of record is valid by the laws of Louisiana, unless its invalidity is judicially declared in the direct revocative action given, by their code, to the creditor against the vendee. It can not be attached collaterally, as, under the Statutes of Elizabeth, or under the Tennessee act of 1801, a common law conveyance may be attached.—*Cage vs. Wells*, 7 Humph., 585.

In Maine, where the attendant circumstances clearly show the intention of both the mortgagor and the mortgagee to have been to place the mortgaged property beyond the reach of legal process, and thereby delay if not defeat creditors, this constitutes a legal fraud, though both parties intended to act for the benefit of all the creditors.—*Wheelden vs. Wilson*, 44 Maine, 1.

In Massachusetts, at common law, a debtor may prefer any one



of his creditors by payment of his debt, or by conveying in trust so much of his property as will be adequate for such payment.—*Widgery vs. Haskell*, 5 Mass., 144; *Hatch vs. Smith*, 5 Mass., 42; *Stevens vs. Bell*, 6 Mass., 339; *Thomas vs. Goodwin*, 12 Mass., 140; *New England Ins. Co. vs. Chandler*, 16 Mass., 275; *Nostrand vs. Atwood*, 19 Pick., 281. And property may be so conveyed to indemnify a surety.—*Stevens vs. Bell*, 6 Mass., 339. But such payment or conveyance will be void as against other creditors, unless assented to and accepted by the creditor preferred.—*Widgery vs. Haskell*, 5 Mass., 144; *Ingram vs. Geyer*, 13 Mass., 146; *Quincy vs. Hall*, 1 Pick., 357; *Marston vs. Coburn*, 17 Mass., 454, 457; *Russell vs. Woodward*, 10 Pick., 408.

In Maryland, prior to the act of 1835, c. 380, the general rule was, that a creditor before he could in equity pursue property fraudulently conveyed, must have first obtained a judgment with respect to realty, and a judgment and *fieri facias* where personal property was to be reached. Yet there are some exceptions to the rule. The case of a guardian suing in behalf of his wards, who is the surety on the bond given by the former guardian, and therefore can not maintain an action at law on the bond, might possibly be so regarded.—*Swan vs. Dent*, 2 Md., Ch. Decis., 111.

But the act of 1835, c. 380, § 2, expressly exempts creditors from the obligations to obtain judgments before they can proceed in equity to vacate fraudulent conveyances.

The conveyances in this case were vacated upon proof that they embraced all the grantor's property real and personal; that they were made to his daughter, who never did and never could have paid the consideration expressed in them; that at the time of executing them he was greatly in debt, and shortly afterward applied for the benefit of the insolvent laws, returning no property in his schedule; and that the whole transaction was a scheme to defraud his creditors. Vide case last cited.

Upon a bill filed by an administrator to set aside a conveyance as fraudulent against the creditors of his intestate, charging that said conveyance was made at the request and by the order of the intestate, for the use and benefit of his wife and children, it was held, that whatever may be the character of the conveyance, so far as the rights of the creditors are concerned, it was certainly good against the party who caused it to be made and his representatives.—*Kinnemon vs. Miller*, 2 Md., Ch. Decis., 407.

The construction of the Statute of 27 Eliz. was not settled in England until after the year 1776; hence it does not prevail in Maryland, under the provision in the Constitution of that State relative to the adoption of the common law.—*Mayor of Baltimore vs. Williams*, 6 Md., 235.

In the Statute of 13 Eliz., c. 5, vacating fraudulent conveyances, the words "creditors and others" will be held to include a wife made the victim of her husband's fraud.—*Feigley vs. Feigley*, 7 Md., 537.

A executed a bill of slaves to B, to secure the payment of a bond

*fide* debt—A and B being both at that time residents of W. County, in the District of Columbia. The bill of sale was duly executed, etc., agreeably to the laws of the District. A afterward removed into Maryland, bringing with him the slaves, which had remained in his possession, and over which he had exercised acts of ownership, paying the court assessment thereon, and selling some of them. A, both before and after his bill of sale to B, was indebted to C, of the said county and district, who recovered judgment against A in A. County, in Maryland, to which A had removed with said slaves. A *fi. fa.* issued upon this judgment, and the said slaves were taken and sold by the sheriff, against whom B brought trespass. Held, that B recover, there being no proof to impeach the validity of the bill of sale or contaminate the transaction with fraud, nor that the property transferred was more than sufficient to pay the debt secured.—Bruce vs. Smith, 3 Har., 499. The retaining possession by the grantor of the property included in a bill of sale duly executed, acknowledged, and recorded, is sanctioned by the Maryland act of 1729, c. 8.—*Id.*

Where a deed, purporting to be made on a moneyed consideration, is attacked as being fraudulent as against the creditors of the grantor, it can not be propped up by proof of an indebtedness to the grantee for services as a clerk, such consideration being inconsistent with that on the face of the deed.—Glenn vs. M'Neal, 3 Md., Chan. Decis., 349.

Where a deed is void as to creditors, the law as to them treats the property as if no such deed had been made, and hence the purchaser, under a judgment in favor of a creditor, takes all that the grantor owned in the property at the date of the deed. Vide case last cited.

The acknowledgment and recording of a bill of sale, according to the Maryland act of Assembly, where the vendor remains in possession, is not conclusive to show absence of fraud, and fraud may be inferred from other circumstances than the vendor's continuing in possession.—Garrett vs. Hughlett, 1 H. & J., 3.

In *Michigan*, where a deed of real estate was made to the wife by her husband, he being much in debt, and after such deed he contracted further liabilities, holding himself out as still owner of such estate, and then failed, making an assignment, and showing assets less than half enough to pay his debts, it was held, that the deed to the wife was fraudulent and void as to subsequent creditors.

Where the circumstances are such that the deed from husband to wife, if voluntary, would be void as fraudulent against creditors, and the wife pays a consideration therefor wholly inadequate, equity will sustain such settlement only so far as to insure the repayment of the money to her.

A deed fraudulent as to existing creditors is, as a general rule, fraudulent as to subsequent creditors.—Hershfeldt vs. George, 6 Mich., 456.

A conveyed to B certain premises to enable B to purchase goods for the joint benefit of both, and, if B succeeded in the purchase,

they were to become partners. B failed to purchase the goods, and a judgment creditor of A, who had sued his claim before A conveyed, levied upon the premises. Held, that the conveyance was fraudulent and void as against the judgment creditor.—*Wiser vs. Farnham*, 2 Mich., Gibbs, 472.

In *Mississippi* it has been held, that an absolute conveyance of property by a person at the time of such conveyance largely indebted, especially where such indebtedness is about to ripen into judgments, and his subsequent possession and continued enjoyment of the property create such a presumption of fraud as to require clear and satisfactory proof of the fairness and *bona fides* of the transaction, that a full price has been agreed to be paid for it, is not alone sufficient.—*Johnston vs. Dick*, 27 Miss., 5 Cush., 277.

A deed conveying property to secure an existing debt, on which more time is given than is usually necessary to collect it by due course of law, is a fraud on the existing creditors of the grantor and a breach of the Statute of Frauds.—*Henderson vs. Downing*, 24 Miss., 106.

In *Missouri*, under the 2d Section of the act concerning fraudulent conveyances, indebtedness, at the time of a voluntary conveyance, is evidence of fraud, although there is some diversity of opinion as to the extent of indebtedness necessary to constitute the conveyance fraudulent.—*Woodson vs. Pool*, 19 Miss., 4 Bennett, 340.

Where a father bought property with his own money, and procured it to be conveyed to his minor children, and afterward sold the same for a valuable consideration, it was held, in an action at trover by the minors to recover the value of the property, that the conveyance to the minors was void as to the subsequent purchaser from him, and that a *bona fide* purchaser for a valuable consideration is protected under Statutes of 13 and 27 Elizabeth, whether he purchase from a fraudulent grantor or grantee.—*Howe vs. Waysman*, 12 Miss., 169.

In *New Hampshire*, in an indictment on the statute for falsely and fraudulently mortgaging personal property, to prevent it from being taken on legal process for the mortgagor's debts, if the debt or obligation intended to be secured is falsely described in the condition of the mortgage, and the mortgage is made in whole or in part for the purpose of preventing the property mortgaged from being seized on legal process, this is in law a fraud on the creditors of the mortgagor, and the making of the mortgage is a violation of the statute.—*State vs. Marsh*, 36 N. H., 196.

A conveyance of real estate, absolute in its terms, but made for the purpose of securing a debt, with an agreement or understanding between the parties that the land is to be reconveyed upon payment of the debt and interest, is fraudulent and voidable, not only against existing creditors of the grantor, but against those who may have become such after its execution.—*Ladd vs. Wiggin*, 35 N. H., 421.

In *New Jersey*, under the Statute relative to confession of judgments, it is held, that no judgment can be entered by confession,

except for a demand founded on a legal consideration, and for a debt justly and honestly due and owing at the time of the entry of the judgment.—*Clapp vs. Ely*, 3 Dutch., N. J., 555.

A purchaser taking a conveyance of a debtor's property, knowing that the debtor is about to abscond, and with a view of aiding him to raise funds for that purpose, participates in the proposed fraud, and the conveyance is void as against creditors.—*Garr. vs. Hill*, 1 Stockt., N. J., 210.

A conveyance of chattels, unaccompanied by possession, is void in New Jersey.—*Chumar vs. Wood*, 1 Halst., 155.

In New York, an assignment for the benefit of creditors which substantially reserves to the assignors the right to give future preferences, is fraudulent and void as against the creditors of the assignors who have not assented thereto.—*Averill vs. Loucks*, 6 Barb., Sup. Ct., 470.

An assignment directed the assignees to pay the debts specified in the schedules annexed thereto, according to the priority of the several schedules, and provided that such schedules should be made within sixty days, and be annexed to and form part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein, the preparation of such schedules being left entirely to the discretion of the assignors, and it appeared that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared and annexed at some subsequent time. Held, that the assignment was fraudulent and void, and that, even if the schedules were prepared and annexed within the sixty days, this would not render the assignment valid from the time the schedules were annexed.—*Averill vs. Loucks*, 6 Barb., Sup. Ct., 470.

An assignment by an insolvent debtor of all his property, consisting in this case of a large real estate, in trust to pay certain specified creditors, and then, without making provision for other creditors, in trust to reconvey the residue to the debtor, is, as to creditors not provided for in the deed, fraudulent and void upon its face, and can not be made good by showing there will be no surplus after paying the creditors provided for.—*Barney vs. Griffin*, 2 Comst., 365.

An assignment by an insolvent debtor of his estate for the benefit of certain creditors is fraudulent and void in New York, where, by the terms of the deed, the trustees are authorized to sell the property on credit.—*Barney vs. Griffin*, 2 Comst., 363.

A conveyed personal property to trustees for the benefit of his wife, with authority to them to loan its value to A, taking his note. The property continued in the possession of A, who gave his note for the value to the trustees. A afterward assigned the property for the benefit of creditors, making the note to the trustee a preferred debt. Held, that the assignment was fraudulent as against creditors of A, who became such after the note of the trustees was given.—*Fielder vs. Day*, 2 Sandf., Sup. Ct., 594.

An assignment of property in trust for the payment of the assignor's debts authorized the assignees to take possession of the premises forthwith, and within such convenient time as to them should seem meet, by public or private sale, for the best price that could be procured, to convert the property into money; and by another clause authorized the assignees to ask, demand, sue for, and compound and agree for all or any part of the debts due and owing to the assignor as the assignees should deem meet. Held, that the assignment was fraudulent in law and in fact, and therefore void as against creditors.—*Woodburn vs. Mosher*, 9 Barb., Sup. Ct., 255.

As to the effect of a voluntary sale of chattels, with an agreement contained in the deed, or out of it, that the vendor may keep possession, and how far such a sale will be deemed fraudulent and void as delaying and hindering creditors, and the special reasons and circumstances under which such deeds will be upheld, vide *Sturtevant vs. Bullard*, 9 Johns., 337; *Ludlow vs. Heard*, 19 *id.*, 221; *Bisyll vs. Hopkins*, 3 Cow., 166; *Doane vs. Eddy*, 16 Wend., 523; *Butler vs. Van Wyck*, 1 Hill, 438.

An assignment of the property of the assignor in trust for the benefit of creditors, which contains a provision authorizing the assignee in his discretion to change the order of the preferences given therein to the preferred creditors, is fraudulent and void on its face.—*Strong vs. Skinner*, 4 Barb., Sup. Ct., 546.

An assignment, executed by a man in embarrassed or insolvent circumstances of his property in trust for the benefit of creditors, is valid, if it unconditionally and absolutely devotes the whole of the assigned property to the payment of his debts, provided it be made without any intent to hinder, delay, or defraud his creditors; and if such assignment is valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it.—*Browning vs. Hart*, 6 Barb., Sup. Ct., 91.

A, who was largely in debt and embarrassed in his business, and unable to pay his debts, sold his stock of goods in his store to B for \$1500, and received from him two notes for \$400 each, payable in one and two years after date, and allowed the residue of the purchase-money to be retained by B in payment of a debt of \$63 which he owed him, and to secure him for his liabilities as indorser or surety for the then late firm of A & B, but which liabilities were never paid by B, it was known to B at the time of the purchase that A had been prosecuted, and was insolvent. Held, that such sale and purchase were fraudulent and void as against creditors.—*Browning vs. Hart*, 6 Barb., Sup. Ct., 91.

A voluntary conveyance by a grantor who is, at the time of making it, insolvent, is void as respects creditors; and the land, after the death of the grantor, is assets, by descent or devise, in the hands of his heirs or the devisee of the residuum of his estate, in an action by the creditor against the heirs and devisees.—*Manhattan Company vs. Osgood*, 15 Johns., 162. And where some of the defendants were also executors of the grantor, and petitioned for a sale of the grantor's estate on account of an alleged deficiency of personal assets,

this was held evidence against the defendants to show the insolvency of the grantor.—*Id.*

The circumstance that a man was insolvent at the time of executing a conveyance of land is a matter to be left to the jury, as tending to influence them in finding that the deed was fraudulent.—*M'Connell vs. Brown*, Litt. Sel. Cas., 459.

A conveyance by a person indebted at the time, absolute on its face, but intended to enable the grantee to sell the land and pay the debts of the grantor, rendering the surplus, if any, to him, is void as against his creditors.—*Jackson vs. Brush*, 20 Johns., 6.

An assignment for the benefit of creditors of the assignor is fraudulent and void on its face if it makes provision for only part of the creditors of the assignor, and, without making any provision for the rest of the creditors, directs the assignee to reassign to the assignor the surplus, if any remains after satisfying the debts provided for in the assignment.—*Story vs. Skinner*, 4 Barb., Sup. Ct., 546.

In North Carolina the Statute of 1840 relative to such conveyances applies as well to those made before its passage as to those subsequently made.—*Arnett vs. Wanett*, 6 Iredell, 41.

Under the 13 Elizabeth, in order to avoid voluntary conveyances to children, it is necessary to show that the maker of the deed was indebted at the time, or so soon afterward as to connect the purpose of making the deed with that of contracting the debt and defeating it.—*Smith vs. Reavis*, 7 Iredell, 341.

In this State fraudulent conveyances are made absolutely void by statute, and are not merely avoidable.—*Flynn vs. Williams*, 7 Iredell, 32.

In order to make a deed of trust, conveying property for the satisfaction of certain creditors, valid as against judgment creditors of the grantor, it not being shown that, independent of the property conveyed, the grantor had enough at the dates of the deed to satisfy other creditors, the party relying upon the deed must produce evidence of the existence of the debts therein mentioned, or at least of such an amount of them as will show, *prima facie*, that the transaction was *bond fide*. The *onus* of proving fraud alleged to impeach the deed is then thrown upon the party alleging it.—*Feimster vs. M'Rorie*, 12 Ired., 287.

Where an insolvent debtor transfers his effects to an infant, on an agreement made *bond fide* that the infant would pay certain debts contracted by them both as a firm, without providing security for the performance of such stipulation, such transfer is fraudulent in law, and void as against creditors.—*M'Corkle vs. Hammond*, 2 Jones, Law N. C., 444.

Where there was an existing debt, and the debtor made a voluntary conveyance, and afterward became insolvent, so that the creditor at the time must lose his money unless the property so conveyed could be reached, such voluntary conveyance is presumed, as a matter of law, to be fraudulent.—*Black vs. Sanders*, 1 Jones, Law N. C., 67.

A provision in a deed of trust for the postponement of the sale of

the property for nine months, and then to be sold by the trustee on a credit of six months, is not a fraud in law so as to require the court to declare such deed void upon its face.—*Gilmer vs. Earnhardt*, 1 Jones, Law N. C., 559. The deed in such a case might not be absolutely void, but evidence of extrinsic circumstances of fraud and of the intent of the debtor, given *dehors* the deed, might render it void.

By the act of 1840, c. 28, a purchaser from a grantor, who has before granted the same premises fraudulently to another grantee, will only be protected when he has bought for a valuable consideration, and without notice of the prior fraudulent deed.—*Heatt vs. Wade*, 8 Ired., 340.

As to retaining possession in North Carolina, see *Vick vs. Kegs*, 2 Hayn., 126; *Falkner vs. Perkins*, *id.*, 224; *Smith vs. Niel*, 1 Hawks, 341; *Trotter vs. Howard*, *id.*, 320; *Howell vs. Elliott*, 1 Badg. & Dev., 76.

In Ohio it has been held, that a person largely indebted can not give away his property, without amply providing for the payment of his debts. Such a gift is never upheld, unless property is retained, clearly and beyond doubt, sufficient to pay all the donor's debts at the time of the gift.—*Crumbaugh vs. Kugler*, 2 Ohio, N. S., 373.

Such a gift would be construed to be a gift made by the donor with intent to hinder and delay creditors, and would be an act of bankruptcy within the meaning of this section.

A mortgage given to a creditor to secure the debt of the mortgagor, and in order to prefer such creditor, is not fraudulent and void.—*Kemp vs. Walker*, 16 Ohio, 118.

A conveyance made to secure notes tainted with usury, and also notes not subject to any objection, is void only to the extent of the usurious notes, and may be supported as to the residue.—*Morris vs. Way*, 16 Ohio, 469.

In Pennsylvania, to render a voluntary conveyance bad as to subsequent creditors, it must appear that it was made in contemplation of future indebtedness.—*Waterson vs. Wilson*, 1 Grant's Cases, Penn., 74.

A conveyance of real estate by a father to his son, with the intention of delaying and hindering creditors, is void, whether the consideration amounts to the value of the land sold or not; and, in such case, the son can not set up an outstanding title to the land in another against the purchaser at a sheriff's sale of the father's title, the father being in possession at the time of the sale.—*Zerbe vs. Scheller*, 16 Penn. State R., 4 Harris, 488.

A deed, whether voluntary and without consideration, or for a valuable consideration, made upon a parol trust, declared at the time of its execution that the grantee should hold in trust for the children of the grantor, if intended as a fraud upon the grantor's creditors, is void as against the creditors, but is valid as against the grantor and the children for whose benefit it was designed, and the grantee will be entitled to hold as against the children or their

vendee; and this, whether the trust is by parol or in writing, and whether the grantee of the children is in possession or not.—*Murphy vs. Hubert*, 16 Penn. State R., 4 Harris, 50.

A conveyance by a debtor, for a nominal consideration, of all his real estate in trust, to sell and apply the proceeds to such persons and in such proportions as he should, by writing, under his hand appoint, is fraudulent as against a prior creditor, even though the debtor, by deed made a few days after, and recorded at the same time with the conveyance in trust, and before such prior creditor has recovered judgment, appointed the proceeds first to certain creditors, and then to creditors generally.—*Mitchell vs. Stiles*, 13 Penn. State R., 1 Harris, 306.

A conveyance of real estate made with the intent, known to the grantee, to delay, defeat, and hinder a particular creditor of the grantor from obtaining his debt, is fraudulent and void as against such creditor, though made for a full and valuable consideration.—*Ashmead vs. Hean*, 13 Penn. State R., 1 Harris, 584.

If a transfer of property would have the effect to prevent the collection of the grantor's debts, a grantee, without consideration, whether there was fraud on his part or not, would take no title as against creditors. — *Clark vs. Depew*, 25 Penn. State R., 1 Casey, 509.

The declarations of a grantor as to a fraud on his part, are not evidence against a *bona fide* purchaser for value, though they were made before the execution of his conveyance, the purchaser having no knowledge of the grantor's fraudulent design.—*M'Elpatrick vs. Hicks*, 21 Penn., 9 Harris, 409.

Although the fraud of the grantor would not defeat the title of a *bona fide* purchaser without notice of the fraud or intended fraud of such grantor, the execution of such a deed by a debtor would be evidence of an act of bankruptcy under the provisions of this section.

Where the conveyance of land is alleged to be fraudulent, the conduct and declarations of the grantor at that time relative to other property of his claimed by the grantee, though made in the grantee's absence, are admissible to establish fraud.—*Covanhoven vs. Hart*, 21 Penn., 9 Harris, 495.

The pecuniary condition of the parties to an alleged fraudulent transfer at and about the time of the transactions under investigation, is generally competent and important proof, as it enables the jury to judge of the reasonableness of their conduct; and therefore where the alleged consideration of a conveyance of land is a previous indebtedness of the grantor to the grantee for money loaned, it is competent for the latter to show that the former, who had opened a mercantile establishment near the time when the loans were made, was not possessed of any considerable means of property. Vide case last cited.

As to how far possession by a mortgagor or vendor, after mortgage or sale, is evidence of fraud in Pennsylvania, vide *Young vs. McClure*, 2 Watts Ter., 147; *Dawes vs. Cope*, 4 Binn., 258; *Babb vs.*



Clenson, 10 S. & R., 419; Shaw vs. Levy, 17 *id.*, 99; Hower vs. Gessman, *id.*, 251; Streefer vs. Eckhart, 2 Whart., 302; Hoofsmith vs. Cope, 6 Whart., 53; Levy vs. Wallis, 4 Dall., 167; Waters vs. McClellan, *id.*, 208; Chancellor vs. Phillips, *id.*, 213; Myers vs. Harvey, 2 Penn. R., 478; Clow vs. Woods, 4 S. & R., 275; Welsh vs. Hayden, 1 Penn. R., 57; S. P., 8 S & R., 510.

In Tennessee, a conveyance of land made while an action of slander was pending against the vendor, for the purpose of avoiding the payment which might be recovered in said action, the vendee having full knowledge of the circumstances, and the fact of a payment of consideration being doubtful, is fraudulent and void. The plaintiff in the slander suit having recovered judgment, brought his bill to set aside the conveyance and subject the land to the payment of the judgment, and it was decreed accordingly.—Farnsworth vs. Bell, 5 Sneed, Tenn., 531.

As to retaining possession in Tennessee and Kentucky, see Ragan vs. Kennedy, 1 Tenn. R., 91; Callen vs. Thompson, 3 Yerg., 475; Manley vs. Killough, 7 Yerg., 440; Mitchell vs. Beal, 8 *id.*, 142; Bayley vs. Smithers, 1 Litt., 112; Goldsbury vs. May, *id.*, 256; Handley vs. Webb, 3 J. J. Marsh, 643; Walsh vs. Medley, 1 Dana, 269; Brummel vs. Stockton, 3 Dana, 134; Laughlin vs. Ferguson, 6 *id.*, 117; C. Dana, 120; 5 Litt., 243; 1 J. J. Marsh, 282; 3 *id.*, 453; 3 Dana, 204.

In Texas, a voluntary conveyance to defraud creditors is void as to subsequent *bona fide* purchasers without notice. But purchasers for a valuable consideration with notice are not protected by the statute to prevent frauds, etc.—Hart. Dig., art. 1452; Fowler vs. Stoneum, 11 Texas, 478.

A fraudulent conveyance can be defeated only by creditors, or purchasers without notice, and not by the administrator of the maker of the conveyance. And where an action is brought by creditors against the administrator and the fraudulent vendees, the creditors may recover as against the latter, even if by any accident they fail as to the former.—Cobb vs. Norwood, 11 Texas, 556.

In Vermont, a conveyance by a debtor of all his property to secure the future support of himself and his family, without making provision for the payment of all his debts, is fraudulent in law as to the creditors for whom no provision is made.—Jones vs. Spear, 21 Vt., 6 Washb., 426.

In Virginia, a conveyance by a debtor to a trustee to secure A, who is surety or indorser for the debtor and all other creditors in law, without particularly describing their debts, with the right to contract other debts to be secured by the deed, and in case of payment by the debtor of debts on which A was surety, then he to be a creditor under the deed, with the privilege also to the debtor of holding the property sixteen months and selling the same, paying over the proceeds to the trustee, was held to be fraudulent on its face.—Spence vs. Bagwell, 6 Gratt., 444.

Where a deed conveyed a stock of goods and a store-house for the current year in trust to pay certain debts, but with a proviso

that the grantor should keep possession of and sell the goods in the ordinary course of his business, and occupy the store "until default in the payment of any of the debts secured, or until the trustee should be requested by any of the said creditors to close the deed by a sale," it was held, that the deed was fraudulent *per se*, and null and void against creditors.—*Addington vs. Etheridge*, 12 Gratt., Va., 436.

In Virginia, a deed of trust was executed conveying land, slaves, crops on hand and made, and crops growing to secure *bond fide* creditors, not to be enforced till the end of two years, the profits to be received by A, and the proceeds of sale, after paying the debts secured, to be paid to the grantor, which deed was executed without the knowledge of the creditors. It was held, that such a deed was not fraudulent.—*Dance vs. Seaman*, 11 Gratt., Virg., 778.

An absolute bill of sale of personal property, with possession continuing with the vendor, is fraudulent *per se* as to creditors, without other evidence of fraud, or being connected with other circumstances.—*Alexander vs. Deneale*, 2 Munf., 311; *Robertson vs. Ewell*, 3 *id.*, 1; *Land vs. Jeffries*, 5 Rand., 211; *Clayton vs. Anthony*, 6 *id.*, 285; *Snyder vs. Gee*, 4 Leigh., 535.

A deed of arrangement between a debtor and one of his creditors, conveying all the property of the debtor to the creditor, and which deed the debtor has power to revoke and alter at any time, and attempts to use it as a shield to protect himself against the claims of his other creditors, is fraudulent and void against creditors whose interests are affected by the deed, notwithstanding the deed, upon the face of it, purports to be for the benefit of all the creditors. Such a deed is, in truth, for the benefit of the debtor; and if a creditor accepts it, he takes it, not for his own benefit, but for the purpose of carrying out the views and objects of the debtor in fraud of the other creditors.—*Smith vs. Hurst*, 15 Eng. Law and Eq., 520.

A conveyance by a debtor to his creditor in satisfaction of the debt, and the residue of the purchase-money secured by judgment bonds payable within six years, and to be applied in payment of other creditors, is fraudulent within the 13th Eliz.—*Kepner vs. Burkhardt*, 5 Barr., 478.

A secret conveyance of personal property by a wife on the eve of her marriage, in trust for the use of her children by a former marriage, is fraudulent and void as against her husband.—*Manes vs. Durant*, 2 Rich., Eq., 404.

Any conveyance which materially hinders and delays creditors in the assertion of their rights, especially if there is any reservation of a benefit to the grantor, is fraudulent and void as to creditors.—*Arthur vs. Commercial and Railroad Bank*, 9 S. & M., 394.

If a debtor, in failing circumstances, whether an individual or a corporation, conveys all his property to trustees to hold for an indefinite period, until out of the profits all his debts have been paid, and then to be reconveyed, the conveyance is fraudulent and void as to creditors.—*Id.*

A deed of trust, as security for a debt, is *prima facie* valid, and a claimant under such deed is not bound to show a consideration for it in the first instance, and a party impeaching such deed must do so by proof.—*Brown vs. Bartie*, 10 S. & M., 268.

A bill of sale of personal property, executed and acknowledged, but not recorded, is void as to creditors if made to their injury, but is binding on the donor, her executors, etc., and all persons claiming under her or them, both at common law and under the Maryland act of 1729, c. 8, § 6. The executor of the donor has no right to the goods, and is estopped to allege that the deed is a fraud upon the creditors. The property is not assets in his hands, and he is not accountable for it as executor.—*Dorsey vs. Smithson*, 6 H. & J., 61.

A deed conveying all the grantor's property to certain trustees in trust: first, to defray the expense attending the execution of the trust; second, to the payment of the several creditors named in the schedule annexed to the deed; third, to the payment of the claims of such creditors as shall, on or before a given day, execute and deliver to the trustees full and absolute releases and acquittances of such claims; and fourth, if any surplus shall remain, to apply the same to the satisfaction of the claims of all other creditors of the grantor, without distinction or priority, was held to be fraudulent and void, both at common law and under the Statute of the 13th Elizabeth. But see note at the end of the case.—*Albert vs. Winn*, 7 Gill, 446.

Upon review of all the authorities, it was the opinion of the court in this case that a deed which does not fairly devote the property of the debtor in desperate circumstances to the payment of his creditors, but prescribes to them the terms upon which they shall receive part payment, is in law fraudulent and void.

Where a conveyance of real estate is good in part and bad in part, as against the provisions of a statute, it is void *in toto*, although there be no fraud intended. Vide case last cited.

Where a sale of slaves was made to his mother by a person in embarrassed circumstances just before the term of court at which several judgments were rendered against him, and there appeared to be many suspicious circumstances attending the transfer, and no proof of consideration except the evidence of the vendor, it was held that the sale was fraudulent against his creditors.—*Walton vs. Kennedy*, 3 Strobb., Eq., 1.

A and B were insolvent, and owned several large tracts of land; and it was agreed between them, their creditors, and their father, who was also largely involved with them, that the sheriff should sell the land for the purpose of making title; and it was understood that C, a brother of A and B, would act as agent of the creditors and debtors of the sales. D had bargained for the purchase of a certain tract with the father, which tract C bid in at the sale for a nominal consideration; and for another tract there were several bids at the sale, but it was finally knocked down to C for a small consideration. The other tracts were all bid in by him for merely nominal considerations. The bid for D's lot was transferred to

him, and he took the deed. Held, that the sale to D and the sale on which there were several bids should stand, the proceeds going for the benefit of the creditors of A and B; but that the other sales must be annulled as fraudulent, and resales were ordered.—*Simon-ton vs. Davis*, 4 Strobb., Eq., 133.

A settlement by a debtor upon his wife and children, for no valuable consideration, of such an amount of property as to impair his means, so as to delay and hinder his creditors, is as to them void, although made without any fraudulent intent.—*Parish vs. Murphree*, 13 How., U. S., 92.

It is no evidence of fraud, which will avail a subsequent purchaser, that one who has conveyed property to a trustee for the benefit of his wife and children remains in possession of the property.—*Hundall vs. Teasdale*, 1 M'Cord, 227.

The pendency of suits against the vendor at the time of sale, and the retention of the thing sold by him, are almost conclusive evidence of fraud.—*Smith vs. Henry*, Bailey, 118. See *Kennedy vs. Ross*, 4 Const., R. T. C., 125; *Hudnal vs. Wilder*, 4 M'Cord, 294; *Anderson vs. Fuller*, 1 M'Mullan, 27.

A vendor's retaining possession after an absolute and unconditional sale of chattels, is only *prima facie* evidence of fraud.—*Terry vs. Belcher*, 1 Bailey, 568.

It will be observed that this act of bankruptcy may be committed by the bankrupt within the United States or elsewhere. The United States Bankrupt Act of 1841 did not contain such a provision, and it had been decided in the English Courts where the Bankrupt Acts did not contain such enactments, that conveyances executed out of England were not within the meaning of those acts.—*English vs. Grant*, 5 Term Rep., 530.

The same words, "or elsewhere," have been inserted in all the recent English acts. Lord Mansfield held, that there was a locality in acts of bankruptcy. The trader, whether a native or a foreigner, must be in England when he commits the act of bankruptcy upon which the commission is founded. By the words of this section, however, the act of bankruptcy is complete, no matter where the assignment, etc., may have been made or the transaction have taken place.

It will be seen, therefore, that under this section a debtor commits an act of bankruptcy by making an assignment, a gift, a sale, or a conveyance or transfer of his estate, property, rights, or credits, to delay, defraud, or hinder his creditors, whether such transaction takes place within the United States or in any foreign country.

*Sixth.*—Having been arrested and held in custody under, or by virtue of meane process or execution, issued out of any court of any State, District, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such

*State, District, or Territory applicable thereto, for a period of seven days.*

There must be an actual arrest and holding in custody for a period of *seven days*, and the act of bankruptcy is not complete until the seven days have expired.—Higgins vs. M'Adams, 37 Law J., 1.

The custody must be either under *mesne*, or final process, issued out of any court of any State, District, or Territory within which such debtor *resides* or has property. The demand, in respect of which such process has issued, must be in its nature *provable* under the estate of the debtor when bankrupt. The amount of such demand must exceed the sum of *one hundred dollars*. The process must remain in force, and not be discharged by payment, or in any other manner provided by the law of such State, District, or Territory applicable thereto, for the period of seven days. This was not created an act of bankruptcy by the United States Bankrupt Act of 1841, and has been adopted from the English Bankrupt Acts. Vide 12 & 13 Vict., chap. 106, § 39. The lying in prison, as it is there called, must be for a period of twenty-one days. The time of remaining in custody must be calculated from the arrest, the day of the arrest being included.—Glassington vs. Rawlins, 3 East., 407. In case of a surrender in discharge of bail, from the day of the surrender.—Tribe vs. Webber, Willes, 464. Where the debtor has been suffered by the sheriff to go at large after the arrest, the seven days are to be reckoned from his return into custody.—Barnard vs. Palmer, 1 Camp., 509. The principle upon which the remaining in custody is declared an act of bankruptcy is, that it is a test of the insolvency of the debtor. If a debtor be arrested and detained in custody in any State, District, or Territory in which *he does not reside or has no property*, such arrest and detention in custody would not be, under this provision, an act of bankruptcy.

There needs no *intent to delay* creditors on the part of the trader to constitute this act an act of bankruptcy. The arrest must be a legal arrest, and it will be insufficient to ground an act of bankruptcy, however lawfully it subsequently becomes, if it were illegal in its inception.—Deac., 77. The debt for which the arrest is made must be a real subsisting legal debt.—Eden, 35. Therefore, an arrest by an executor before probate is insufficient.—3 Lev., 439; S. C., T. Raym., 478. So arrest on a bond, before the day of judgment, and so is an arrest on an equitable demand, when the remedy is by bill for specific performance.—*Ex parte* Hillyard, 1 Atk., 147; 2 Ves., 407; Eden, B. L., 35. A penalty due to the crown is a sufficient debt.—Cobb vs. Symonds, 1 D. & R., 111; S. C., 5 B. & A., 516. And a party lying in prison under a magistrate's warrant of commitment, in force at the time he was under civil process for debt, is an act of bankruptcy.—Rex vs. Page, 7 Pir., 616; 3 Moo., 656; S. C., 1 B. & B., 368; Eden, 34.

The remaining in custody must be for the uninterrupted period of seven days, and the bankrupt must be in actual custody seven days, under the arrest or commitment; and where an interruption has taken place, the act of bankruptcy will have relation to the sub-

sequent imprisonment.—*King vs. Leith*, 2 T. R., 141; *Coppendale vs. Brigden*, 2 Burr., 814. As where a trader was arrested, and, before the expiration of the seven days, is bailed out, and afterward render in discharge of his bail and remain in custody seven days, it is the second imprisonment from the time of his render which constitutes the act of bankruptcy, *Tribe vs. Webber*, Willes, 464; *ex parte Dufresne*, 1 B. & B., 50; *Cane vs. Coleman*, 1 Salk., 109; or, where he is allowed to go at large for a few days, the period is computed from his return.—*Barnard vs. Palmer*, 1 Camp., 509. But where the bail was matter of form, and put in without justification, only with the view of turning the party over from the custody of one party to that of another, it was considered a continuation of the same imprisonment, and the seven days were reckoned from the first arrest.—*Rose vs. Green*, 1 Burr., 437. The word prison does not necessarily mean the county jail, or any of the county prisons; it will suffice that the bankrupt was in actual custody during the seven days. Where a trader was arrested in his own house, but, being too ill to be removed, remained there in custody of the follower of the sheriff's officer, and was afterward imprisoned, the period was held to commence from the day of the arrest, *Stevens vs. Jackson*, 1 Marsh, 464; S. C., 4 Camp., 164; but see *Benton vs. Sutton*, 1 B. & P., 24; and so, where the party had the benefit of the day rules, the period was not considered to be interrupted, for he was still deemed to be in custody.—*Soames vs. Watts*, 1 C. & P., 400. Where a trader was in custody at the suit of one plaintiff, and was detained at the suit of another, the period was computed from the arrest.—*Coppendale vs. Brigden*, 2 Burr., 814. The *docket* being struck previous to the expiration of the seven days, will not affect the act of bankruptcy; but the bankruptcy can not be supported unless issued subsequent thereto.—*Gordon vs. Wilkinson*, 8 T. R., 507; *ex parte Dufresne*, 1 V. & B., 51; 1 Rose, 333. The day of the arrest or going to prison is reckoned the first day, or part of the seven days, and on the termination of the whole of the last day the act of bankruptcy will be complete, *Glassington vs. Rawlins*, 3 East., 407; *Saunderson vs. Greg*, 3 Stark., 72, but does not relate back to the first day, as under the 21 Jac., 1, c. 19, but only to the last.—*Moser vs. Newman*, 6 Bing., 556; *Higgins vs. M'Adam*, 3 Y. & J., 1; *Tucker vs. Barrow*, 3 C. & P., 85.

In order to prove an act of bankruptcy by lying in prison, the arrest, detention, and cause of such arrest or detention, must be proved. The arrest may be proved by a copy of the writ and the return of *cepi corpus*, or by proof of the writ, the warrant, and the arrest. The detention may be proved by producing the prison-book, containing entries of the date of the several commitments and discharges to and from prison, *Rex vs. Aickles*, 1 Leach, 436; but they are not evidence of the *cause* of the commitment, for the commitment itself is higher proof, and, if in existence, ought to be produced.—*Salter vs. Thomas*, 3 B. & P., 188. The cause of commitment may be proved by the production of the *committitur*. The English authorities are thus cited by the author, the provision not

having existed in either of the previous United States Bankrupt Acts.

An arrest and detention in custody for any tort, such as personal injuries, libel, assault, criminal conversation, or other cause of action *ejusdem generis*, for which the laws of the various States authorize arrest on *mesne process*, or in execution, will not be an act of bankruptcy; the section enacts, that it must be on a demand in its nature *provable* under the bankruptcy.

*Seventh.—Having been actually imprisoned for more than seven days in a civil action founded on contract for the sum of one hundred dollars or upward.*

It may be questionable whether the former paragraph of the section with respect to the "process having been issued out of the court of a State, District, or Territory within which the debtor resides or has property," is to be incorporated with this, or whether an actual imprisonment under process issued by the court of *any* State, District, or Territory wherever the debtor may happen to be, for *more than seven days*, will be an act of bankruptcy. Whether, in fact, a debtor from the State of Pennsylvania, residing there, or having property there, if arrested in the State of New York by process from the court of the latter State, commits an act of bankruptcy by lying in prison in New York for more than seven days? If the imprisonment for more than seven days, the inability to procure bail, if under *mesne process*, or to pay the amount of the execution, is a test of insolvency, such imprisonment in any State would afford the same evidence, and this may be probably the proper construction of this subdivision of the section. It was held, under the English Bankrupt Act from which this provision is taken, that where a debtor was taken in execution under a judgment, and sent to the county jail, and also under a coroner's warrant which had been issued against him, in the mean time, on a criminal charge, and he continued in prison for more than twenty-one days under both the judgment and the warrant, that such remaining in prison constituted an act of bankruptcy.—*Ex parte Crabb*, 39 Eng. Law and Eq., 397.

The action must be a civil action, founded upon contract, express or implied, and the amount for which the debtor is imprisoned must be one hundred dollars at the least.

*Eighth.—Who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent by such disposition of his property to defeat or delay the operation of this act.*

The 35th Section having declared all fraudulent preferences and conveyances void, this section enacts that they shall also constitute acts of bankruptcy. The subject has been fully treated in the notes to that section, to which the reader is referred.

The Bankrupt Act of 1841 created substantially the same act of bankruptcy. *Procuring or suffering his property to be taken on legal process*, either with the intent to prefer a particular creditor, or to defeat or delay the operation of the act, is made an act of bankruptcy. Until the property has been actually taken by legal process the act of bankruptcy is not complete, and it is only from that time that the rights of the assignees accrue, *Belcher vs. Gummort*, 9 Q. B., 873; and such an act of bankruptcy is not carried back to any earlier period. A fraudulent judgment and execution, or any collusion in assisting a creditor to obtain such judgment at an earlier date than in due course of law, constitute an act of bankruptcy. The words of the section are comprehensive, including *any legal process* upon which property can be taken. There is a distinction between a debtor's *procuring* and *suffering* his property to be taken. *Vide Gore vs. Lloyd*, 12 M. & W., 463; *Gibson vs. King*, Car. & M., 458.

A debtor, by procuring bills of exchange, his property to be taken in execution with intent to defeat his creditors, commits an act of bankruptcy.—*Edwards vs. Cooper*, 11 Q. B., 33. Merely allowing judgment to go by default, under which the debtor's goods are taken in execution, if the debtor does no more, is not *procuring* the goods to be taken in execution so as to constitute an act of bankruptcy. *Vide case last cited*. Where a creditor, being pressed by his landlord for rent due, gave him a warrant to confess judgment, with an understanding that judgment should be entered up, but not be executed unless other executions came against his property; other writs did come in, and the goods were taken in execution upon the judgment so confessed, this was held not to be an act of bankruptcy, as *procuring* the goods to be taken.—*Gore vs. Lloyd*, 12 Mee. & W., 463; 12 Law J., Exch., 366. The legal process, whether attachment, execution, or whatever mode of seizure, must be shown to have been procured by the debtor with the intent to defeat or delay his creditors. *Vide*, for the evidence of such fact, 13 C. B., 285; 13 Law J., Exch., 366; and the cases cited in the notes to Section 29, "Order of Discharge."

**Ninth.**—*Who being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed, payment of his commercial paper within a period of fourteen days.*

This act of bankruptcy is confined exclusively to *bankers, merchants, and other traders*. It is the first time in legislation here or in England that such an act of bankruptcy has been created. By the English Bankrupt Acts, the suspension of payment by a banker, merchant, or trader of his commercial paper and liabilities, is resolved into an act of bankruptcy by summoning him before the Court of Bankruptcy, and if the debt or demand be not paid or arranged to the satisfaction of the creditor within a prescribed time, the non-arrangement or non-payment within such prescribed period constitutes an act of bankruptcy.

This provision of the section will apply immediately to the case of banking and trading corporations and joint-stock companies. *Vide* Section 37 and notes.



The provision will also include any banker, merchant, or trader who may be liable upon bills of exchange or promissory notes which are usually denominated commercial paper. The act of bankruptcy is confined to fraudulently stopping or suspending, and not resuming payment of commercial paper within a period of fourteen days. It will not apply, therefore, to stopping or suspending payment of usual and ordinary debts which have not assumed the form of negotiable securities.

It will be observed that the stopping and suspension must have occurred with a fraudulent intent, and the creditor who petitions against any banker, merchant, or trader for adjudication in bankruptcy must establish that fact.

Mere inability on the part of a banker, merchant, or trader to meet his commercial paper at maturity is not created an act of bankruptcy. If, therefore, such suspension of payment and non-resumption of payment within fourteen days can be proved to have been caused by circumstances over which the debtor had no control, either from temporary pressure, or embarrassment, or the failure of other parties, by which he has become involved, without any fraud upon his part, such a transaction would not amount to an act of bankruptcy.

Where a creditor, availing himself of this provision of the section, seeks a compulsory adjudication of bankruptcy by reason of the debtor having committed this particular act of bankruptcy, he must establish the fact that the debt was incurred by the debtor in the character of a merchant, a banker, or a trader. The two former definitions need no comment, but it will be necessary to ascertain accurately what constitutes a trader within the meaning of the Bankrupt Law. Vide notes to this section, title "What constitutes a Trading," *infra*.

**Right of the Assignees to recover from the Fraudulent Assignee or Transferee.**—In the event of an adjudication in bankruptcy, the assignees under the debtor's estate can recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to the provisions of this act; but the assignees must establish either that the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent. Vide notes to Section 35, title "Fraudulent Preferences and Conveyances," where this subject is discussed.

**Proof by such Creditor not allowed.**—Any creditor who has received any payment or conveyance, or any goods, money, or property from the debtor under any such conveyance, gift, sale, or transfer made by such debtor to him within six months before the bankruptcy, and where such transaction amounts to an act of bankruptcy by the debtor, and where the creditor had reasonable cause to believe that a fraud on the act was intended by the debtor, or that the debtor was insolvent at the time of the transaction, will not be allowed to prove his debt under the bankrupt's estate.

**Proceedings for Adjudication.**—It will be remembered that a peti-

tion for a compulsory adjudication in bankruptcy must be presented or filed within six months after the commission by the debtor of any one or more of the acts of bankruptcy before enumerated.

The form of the petition, and the affidavits which should accompany it, will be prescribed by the general rules and orders.

Upon the court being satisfied that sufficient grounds exist, an order is to be entered requiring the debtor to appear and show cause, at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted.

A copy of the petition, and of the order requiring the debtor to show cause, is to be served either upon the debtor personally, or by leaving the same at his last or usual place of abode. If such debtor can not be found, or his place of residence ascertained, service is to be made by such publication as the court may direct.

In the event of a creditor who files his petition for adjudication having good reason to believe that the debtor is about to dispose or make any transfer or disposition of his property, not excepted by the act from its operation, before the adjudication in bankruptcy can be completed, he should present evidence, either *vidæ voce* or by affidavits, to the court for a provisional or *ad interim* injunction to restrain the debtor or any other person from doing so; and if also there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels, or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court has power to issue a warrant to arrest the debtor against whom the petition has been filed; the warrant of arrest is to be issued, and directed to the marshal of the district, who, acting as the messenger of the Court of Bankruptcy, is to arrest the debtor and imprison him until he gives bail to the satisfaction of the court for his appearance as required, until the decision of the court upon the petition for the adjudication has been given.

The court has also power, upon being satisfied that the above allegations made by the petitioning creditor are well founded, to issue a warrant directing the marshal, as messenger, forthwith to take possession provisionally of all the property and effects of the debtor, and keep the same to abide the event of the decision upon the petition for adjudication.

It is to be observed, that on an application for a warrant to arrest the debtor, the court is to be satisfied that there is probable cause for believing that such debtor is about to *leave* the district, not that he is about to *remove* from the district, and it is presumed that it will be sufficient to show generally that the defendant is about to quit the district without suggesting his object, or how long he is to be absent.

Leaving the district, and removing from the district, have very different significations. Removal from a State implies a residence within it, and an intention permanently to leave it, and permanently to reside elsewhere; in other words, a change of domicile is intended; but leaving the district may be construed to mean a mere

temporary departure for the purpose of avoiding the consequences of adjudication in bankruptcy, and an intention not to be within the jurisdiction of the court should such an event take place.

To justify the court in granting the application for a provisional injunction, and in justifying an arrest upon the ground that there is probable cause for believing that the debtor is about to remove or conceal his goods or chattels, or his evidence of property, or that he is about to make any fraudulent conveyance or disposition thereof, sufficient proof should be given of the intent, such as a threat by a debtor that he would assign and put his property out of his hands, or, in case of an intentional leaving, that he was packing up his goods at his place of business, or such other facts as may be capable of being testified in each particular case. Vide notes to Section 39, *fourth* "Act of Bankruptcy."

**Opposing the Adjudication.**—Assuming that the debtor appears to show cause against the adjudication, he has the right, in the first instance, upon the day of his appearance, to demand in writing a trial by jury, to ascertain the facts of such alleged bankruptcy, and, if he does not do so, the court will then proceed to a hearing.

The practice in the English Courts of Bankruptcy is, that inasmuch as all the allegations against the debtor have been made *ex parte*, and that he is entitled upon a hearing to cross-examine the creditor who has filed the petition, and the witnesses who have been examined or made affidavits in support of it, that the petitioning creditor must begin and establish by evidence the allegations of his petition, and all the requisites necessary to support the adjudication, before calling upon the debtor to show cause.—*Ex parte* Clay, 1 Fonblanque, 212.

Should the creditor succeed in establishing a case which, if unanswered, would be sufficient for an order of adjudication, the debtor then by his counsel adduces evidence in answer to, or rebuttal of, the petitioning creditor's case.

We now proceed to consider what proofs the creditor must adduce to obtain an adjudication in bankruptcy.

He must establish,

- 1st. The petitioning creditor's debt;
- 2d. An act of bankruptcy committed by the debtor;
- 3d. If he is proceeding against a banker, merchant, or trader, he must, in addition, establish a trading within the meaning of the Bankrupt Law.

**Petitioning Creditor's Debt.**—The debt upon which to found an adjudication of bankruptcy must be, in its nature, provable under the bankrupt's estate. If it be a debt due to one creditor or to a firm, it must amount to two hundred and fifty dollars; or if the petition be by one or more creditors, the aggregate of their debts must amount to at least two hundred and fifty dollars.

The debt must have existed at the time of the act of bankruptcy relied upon to support the adjudication.

A question may arise upon the construction of this section, whether the debt must be actually due, and recoverable at law by the creditor, at the time when the petition is presented.

Under Section 19, debts due, but not payable until a future day, are *provable*. Vide Sec. 19 and notes. But the author suggests that this section requiring the debt of the petitioning to be a *provable* debt, characterizes only the nature of the debt, and does not mean that the adjudication can be supported upon a debt not actually due. The last English Bankrupt Act, 24 & 25 Vict., chap. 134, sec. 89, expressly enacts "that any creditor who has given credit to any debtor for any sum payable at a certain time, which time shall not have arrived when such debtor committed an act of bankruptcy, may petition, or join in petitioning, whether he shall have any security for such sum or not." Before this provision, every debt of a petitioning creditor must have been actually due, and one for which an action at law could have been maintained. The author suggests that this also must be the position of a petitioning creditor's debt, upon the proper construction of this section. A debt barred by the Statute of Limitations would be unavailing.—*Mayor vs. Paine*, 3 Bing., 284. To support an adjudication against the drawer or indorser of a bill of exchange, presentment and notice of dishonor must be proved.—*Cooper vs. Machin*, 1 Bing., 426. One partner can not petition against another partner, unless the debt be such as he might maintain an action upon.—*Marson vs. Barber*, *Gowson Partnership*, 17.

Executors may petition on a debt due to the testator, and one executor of three may by himself petition.—*Treasure vs. Jones*, 1 Selwyn, N. P., 265. A petition for adjudication may be filed before the executor has obtained probate.—*Ex parte Paddy*, 3 Madd., 241; *Buck*, 235. A trustee is not a sufficient petitioning creditor without the concurrence of his *cestui que trust*, as he can not swear, except by legal fiction, that the money is due to him, nor that the money has not been paid to the *cestui que trust*.—*Ex parte Gray*, 4 Deac. & Chitt., 778; *ex parte Bather*, *Buck*, 426. An infant, it is said, can not be a petitioning creditor, but there is no express decision upon the point, and upon principle there seems to be no reason why he should not be.—*Ex parte Barrow*, 3 Ves., 554. In the case of a debt due to a partnership, the petition of one partner only is not sufficient; it must be by all the partners—not individually, but by their authority.—*Buckland vs. Newsome*, 1 Taunt., 447.

Upon the death of a petitioning creditor before adjudication upon his petition, it was ordered by the Court of Bankruptcy that adjudication should be made upon the depositions of his executors.—*Ex parte Tanner*, 1 Mont. & Mac., 292; *ex parte Winwood*, 1 Glyn. & J., 252.

A husband can not alone be a petitioning creditor in respect of a debt partly due in right of his wife *dum sola*, and partly due to him in his own right.—*Ramsey vs. George*, 1 Rose, 108. The debt may be upon an account if the creditor swear to a sufficient balance.—*Flower vs. Herbert*, 2 Ves., 327; but vide the case *ex parte Bowes*, 4 Ves., 168. A debt will be sufficient, though the debtor has been insolvent, and it was included in his schedule, or though a security of higher nature has been taken for it from the debtor since the act

of bankruptcy.—*Ex parte* Shuttleworth, 2 Glyn., L. J., 68; *ex parte* Griffiths, 21 L. J. Bank., 50.

In all cases where creditors have taken securities they may petition, the courts of law take notice of the rule in equity that the debt is the principal, and the security the incident. A mortgagee may be a petitioning creditor for the amount of his debt without giving up his security.—*Ex parte* Jackson, 5 Ves., 357. A creditor who has taken his debtor in execution can not be a petitioning creditor against him for the same debt, because his debt, in contemplation of law, is satisfied; but if he has not taken the debtor in execution under the judgment he has obtained in the action, he may petition.—*Bryant vs. Withers*, 2 M. & S., 123.

As the debt must be one *provable* under the bankruptcy, it need scarcely be observed, that in cases of claims for unliquidated damages—as in actions for torts—no petitioning creditor's debt can actually or impliedly exist until judgment has been obtained.—*Ex parte* Charles, 16 Ves., 256; 14 East., 197. A sum of money awarded by a referee or arbitrator, until set aside, is a good petitioning creditor's debt.—*Ex parte* Lowndes, 1 Mont., 24. A debt due to a surety will suffice.

The assignees of a bankrupt may petition in respect of a debt due to the bankrupt's estate.

A factor who has sold goods in his own name for an unknown principal may petition, but he ceases to be a sufficient petitioning creditor when he has communicated the name of the purchaser to his principal, who has debited the debtor, and taken any steps to recover the debt directly from the purchaser.—*Sadler vs. Leigh*, 4 Camp., 185; 2 Rose, 286.

In the case of a debt due to any copartnership or incorporated company, the officer authorized to sue may present and file the petition.

Where a further debt is contracted by the bankrupt, after leaving off trade, and he makes a payment without directing to which debt it is to be applied, it will be taken to apply to the old debt; and if it be hereby reduced to a sum less than two hundred and fifty dollars, it will not support an adjudication. So if the fiat issues on an attorney's untaxed bill of costs, which, on taxation, is reduced below the required amount, it will not support the fiat.—*Ex parte* Forde, 1 Mont. & Ch., 97.

A creditor buying in notes to the amount of £100, at ten shillings on the pound, has a sufficient debt.—*Ex parte* Lee, 1 P. Wms., 782.

Where a creditor, to an amount sufficient to support a commission after notice of an act of bankruptcy, received a payment, diminishing the original debt to a sum insufficient to support the commission, it was held that, as that payment was void, there was still a good petitioning creditor's debt.—*Mann vs. Shepherd*, 6 T. R., 79.

Two firms of several partners each may jointly petition, though the debt of neither amounts to two hundred and fifty dollars, if the two debts equal two hundred and fifty dollars.—*Doe vs. Ingleby*, 14 M. & W., 91. Where the debt was for a bill of exchange for

fifty pounds sterling, drawn and issued before the act of bankruptcy, but becoming due afterward, it was objected that the sum of fifty pounds was not due, but only that sum *minus* the rebate of interest; but it was held that the debt was sufficient to support the commission, upon the principle that the debt was contracted at the time the bill was given.—*Brett vs. Levett*, 13 East., 213. Fifty pounds was the amount of the debt to support a bankruptcy in England.

In the case of a bill of exchange, where it is not expressed on the face of it that interest should be paid, it can not be added so as to make up a legal petitioning creditor's debt, *Cameron vs. Smith*, 2 B. & A., 305; *ex parte Burgess*, 2 Moo., 745; S. C., 8 Taunt., 960; even though it be noted and protested, pursuant to 9 & 10 Will. III., c. 17.—*Ex parte Greenaway*, Buck, 412.

Where there is only one petitioning creditor, there must be a debt due to him separately, for which he alone might maintain an action at law.

The debt must be proved to have been contracted before and subsisting at the time of the act of bankruptcy—*Clarke vs. Asken, Pea*, 458, n. Where it was necessary to prove a good petitioning creditor's debt on the 20th of May it was held not sufficient to show that on the 20th of January preceding a sum of £700 was due from the bankrupt, there being subsequent receipts and payments, and other continuing transactions between the petitioning creditor and the bankrupt; for, after a period of three months, it was considered impossible to say, under these circumstances, whether £1000 or £5 were really due, *Gressley vs. Price*, 2 C. & P., 48; overruling *Jackson vs. Irwin*, 2 Camp., 50, where it was held, that from proof of the existence of the debt before the act of bankruptcy, it would be presumed to be still in existence when the act was committed.

The case where a bill or note is produced for the purpose of proving a good petitioning creditor's debt is an exception to the general rule, that the date of an instrument is a *prima facie* proof of the time of its execution, and it may be taken to be now settled, that some evidence is necessary beside the date to show that the instrument produced for that purpose had its existence before the act of bankruptcy took place; and for this reason, that a proceeding in bankruptcy is retrospective to invalidate all transactions between the act of bankruptcy and the fiat, and, therefore, it may be necessary to require more proof than in ordinary cases.—*Anderson vs. Weston*, 6 Bing., N. C., 301. Therefore, an I O U, bearing date before the bankruptcy, is not evidence of a petitioning creditor's debt, without some proof that it was in existence before the bankruptcy, *Wright vs. Lanson*, 2 M. & W., 739; and so as to a promissory note, *Fletcher vs. Manning*, 12 M. & W., 571; the case of *Taylor vs. Kinlock*, 1 Stark., 175, to the contrary, proceeded on a mistaken report of a case on the Northern Circuit, 2 Stark., 594; 2 Stark. Ev., 161; and so where a debt arises on the indorsement or acceptance of a bill, the indorsement of a bill or acceptance itself must be proved to have been made before the commission or fiat, no presumption

arising from the date of the bill.—*Rose vs. Rowcroft*, 4 Camp., 245; *Cowie vs. Harris*, M. & M., 141. But the indorsement may be after the act of bankruptcy, *Glaister vs. Hewer*, 7 T. R., 498; but if the course of dealing between the parties raise a presumption to that effect, that is sufficient, as, if it be shown that about that time goods were sold of a corresponding amount.—*Cowie vs. Harris*, *id.* So where a note bore date before the bankruptcy, and was proved to be in existence before the docket was struck, this was considered *prima facie* proof that it was in existence before the act of bankruptcy. With respect to the subject matter of the debt, the debt must be a legal one, not a mere equitable claim, 1 Atk., 147; 2 Ves., 407, or debt, *ex parte* Hawthorn, Mont., 132. An order by the lord chancellor for payment of a sum to an uncertified bankrupt, was held insufficient to constitute a debt to support a fiat.—*In re Chambers*, 3 Mont. & Ayr., 303. It is doubtful whether a mortgagee in trust can alone issue a fiat against the mortgagor or the mortgage deed, unless the legal validity of the debt has been previously established in an action at law.—*Ex parte* Gray, 2 Mont. & Ayr., 283.

An acceptance by one of two partners in the name of the firm for a pre-existing debt of his own, without the authority of the other partner, will not support a joint fiat against both partners, *ex parte* Austen, 1 Mont., Dea. & D., 247; nor is an acceptance in the name of the bankrupt, without his authority, sufficient to sustain a fiat against him, though he is responsible for the payment of it.—*Ex parte* Edwards, 2 Mont., Dea. & D., 241; 5 Jur., 706.

A judgment debt, on which the debtor has been already taken in execution, will not support a fiat, *Cohen vs. Cunningham*, 8 T. R., 123; nor, *semble*, will a demand for rent, with respect to which an action of replevin is already pending, *Emery vs. Mucklow*, 4 M. & S., 263; but a simple contract debt will, though it has been merged in a higher security, as a bond, *Ambrose vs. Clendon*, 2 Stra., 1042; or a judgment, *Briant vs. Withers*, 2 M. & S., 123, which is invalid by reason of being given or obtained after an act of bankruptcy. So a creditor entering into a composition deed, after an act of bankruptcy committed by his debtor, is not precluded from being a petitioning creditor in respect of the original debt, *Doe vs. Anderson*, 5 M. & S., 161; and see *Ambrose vs. Clendon*, 2 Stra., 1042; Ca. T., Hard., 267.

So where a creditor receives a bill of lading as a security for his debt from the consignee, and the consignor afterward stops the goods *in transitu*, the creditor may issue a fiat on his original debt.—*Ex parte* Ashton, 2 Deac. & Ch., 5. So where the debtor has become insolvent, and included the debt in his schedule.—*Jellis vs. Mountford*, 4 B. & M., 256; *ex parte* Shuttleworth, 2 Glyn. & J., 68. So where a note was given on a wrong stamp as security for a debt, the debt was held sufficient to support a sequestration in Scotland.—*Geddes vs. Mowat*, 1 Glyn. & J., 414.

A debt, though barred by the Statute of Limitations, will be good, if the bankrupt himself make no objection to it, *Swayne vs.*

Wallinger, 2 Stra., 746; Quantock vs. England, 5 Burr., 2628; Mavor vs. Pyne, 3 Bing., 285; but if he object to it, it will not; *Id.*, and Gregory vs. Hurrill, 5 B. & C., 341; 8 M., 189; and Taylor vs. Hipkins, 5 B. & A., 489. A verdict for damages in an action for breach of promise of marriage does not, before judgment, constitute a debt.—*Ex parte* Charles, 14 East., 197.

The debt must be of such a nature, that an action at law might be brought for it by the petitioning creditor against the bankrupt. Therefore it will not support a fiat, if the creditor have covenanted with the debtor not to sue him for it, Small vs. Marwood, 4 M. & R., 181; 2 B. & C., 300; or if it be founded on an illegal consideration, Wells vs. Gozling, 1 B. & B., 447; 4 M., 78; or on a promissory note made in violation of the statutes made for the protection of the Bank of England.—*Ex parte* Randleson, Mont. & Ayr., 86.

One partner can not sue out a fiat against another for a partnership debt, except perhaps where accounts have been liquidated and the partnership determined, and the creditor paid all the debts, *ex parte* Noakes, 2 Mont., 144; and where a partner has filed a bill, and treated a debt as mixed with the partnership, he can not afterward support a fiat upon it, *ex parte* Gray, 2 M. & Ayr., 283; but for a debt not arising out of a partnership transaction, or where they are not equally concerned in the profit and loss, one partner may sue out a fiat against another, Windham vs. Paterson, 1 Stark., 144; or where the profit was equally to be divided between them, but the loss to be exclusively borne by one only.—Marston vs. Barber, Gow, c. 17. So where H P, the bankrupt, borrowed money of his partner by way of personal loan, and on the dissolution of the partnership purchased the stock at a stipulated price, W P had a good petitioning creditor's debt, though he had entitled the account "H P in account with H and W P."—*Ex parte* Richardson, 3 Dea. & Ch., 244. So where A advances £200 to B to set up trade, on an agreement that A should have one eighth of the profits, he may support a fiat on such advance.—*Ex parte* Notley, 1 Mont. & Ayr., 46.

The debt of a natural-born subject residing and trading in an enemy's country will not support a commission.—M'Connell vs. Hector, 3 B. & P., 113. The mere residence, however, will not affect the debt, if it do not appear that it was for the purpose of trading, and that the creditor went there with a knowledge of the existing hostilities.

A debt contracted by an infant will not support an adjudication of bankruptcy, but an acceptance after he came of age, upon a bill drawn when he was an infant, was holden to be a good petitioning creditor's debt.—Stevens vs. Jackson, 4 Camp., 164.

An uncertified bankrupt, *ex parte* Cartwright, 2 Rose, 230, an insolvent debtor, Jellis vs. Mountford, 4 B. & A., 256, may, in most cases, be a petitioning creditor. An executor of a bankrupt can not sue out a commission on a debt due to his testator before his bankruptcy.—1 Atk., 100.

The debt must be a present existing debt, and not one depending



on a contingency.—Deac., B. L., 90; *ex parte* Page, 1 Glyn. & J., 100. A warrant of attorney has been deemed a *debitum in presenti* sufficient to support a commission, though given as a security against running acceptances.—Miles vs. Rawlyns, 4 Esp., 194. The debt should be of a liquidated nature, or capable, from computation, of being liquidated. Vide 2 Ves., 168.

Proof of a surety debt will support a commission against the party liable on it, Hughes vs. Hall, Palm., 325; but a security for a contingent debt will not be sufficient.

The acceptor of an accommodation bill, paying the amount after an act of bankruptcy, has not a sufficient petitioning creditor's debt.—*Ex parte* Holding, 1 Glyn.

Where the act of bankruptcy is founded on a lying in prison, and the debt was contracted after the arrest, it was holden insufficient.—*Ex parte* Doggett, Whitm., B. L., 42.

Where a bankrupt drew a bill in favor of A, to whom he was previously indebted, and committed an act of bankruptcy before either the bill was due or had been presented for acceptance, it was held that the bill was a good petitioning creditor's debt, although it appeared that, subsequent to the commission, the bill had been paid by the acceptors.—*Ex parte* Douthat, 4 B. & A., Eden, 48.

Where there has been an exchange of acceptances between two merchants, and before the maturity of the bill one of them commits an act of bankruptcy, the other can not prove under the bankruptcy, nor is it a good petitioning creditor's debt until he has paid his own bill.—Sarratt vs. Austin, 4 Taunt., 200.

It has been held in England that a penalty due to the crown is a sufficient debt to support a commission, Cobb vs. Symonds, 5 B. & A., 516; so also is an assessment for church and highway rates, and the assessor would be a good petitioning creditor.—Lloyd vs. Heathcote, 2 B. & B., 288.

The debt must be proved to have been contracted, or to have subsisted, while the party was a trader.—Dawe vs. Holdsworth, Pea., 64; Meggott vs. Mills, 1 Raym., 287; S. C., 12 Mod., 157; Baillie vs. Grant, *post*. Where a person contracted a debt and afterward became a trader, and the debt still remaining unpaid, he went out of trade, and afterward committed an act of bankruptcy, a commission founded on this debt and an act of bankruptcy was held to be valid.—Baillie vs. Grant, 1 Cl. & Fin., 238.

If a simple contract debt is contracted while the party is in trade, though he give the creditor a bond for it after leaving off trade, this will not extinguish the debt so as to prevent the creditor from suing out a commission on it.—Dawe vs. Holdsworth, Pea., 64. But if a trader, indebted in £100, quit his trade, and afterward become indebted to the same creditor in £100 more, and subsequently pays £100 without saying on what account, the creditor in this case can not take out a commission on the old debt.—Dawe vs. Holdsworth, Pea., 64; Meggott vs. Mills, 1 Raym., 287.

Where a creditor filed an affidavit of debt under the Bankruptcy Consolidation Act, 12 & 13 Vict., c. 106, § 78, he was bound to notice

and deduct any sum due to the debtor arising out of the same transaction as that out of which his own debt arises, and to claim for the difference only; and if he omits to do so, he was held not to have had reasonable or probable cause for making the affidavit in the amount at which it was made.—*Marshall vs. Sharland*, 1 Eng. Law & Eq. Rep., 231.

Where, therefore, in an action for goods sold and delivered, the plaintiff sought to recover the price of a cargo of coals, the freight of which he was bound to pay to the captain of the vessel before they could be discharged, and the defendant proved at the trial, as a set-off, payment of the freight, and reduced the verdict of the plaintiff by that amount, it was held, that the plaintiff had not any reasonable or probable cause for making an affidavit of debt in the Bankruptcy Court for the full price of the coals, without deducting what had been paid by the defendant for freight; and the court under 12 & 13 Vict., c. 106, § 86, ordered that the defendant should have the costs of the suit.—*Marshall vs. Sharland*, 1 Eng. Law & Eq. Rep., 231.

A factor who sells goods in his own name, without a *del credere* commission, is a good petitioning creditor against the purchaser for his principal, *Sadler vs. Leigh*, 4 Camp., 185; 2 Rose, 286; but he ceases to be so when the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt directly from his purchaser.—*Ex parte Dalby*, 4 Deac., 261; Mont. & Chit., 636.

An adjudication founded on the petition of a British subject resident in England, for a debt due to himself and partners, also British subjects, but resident and carrying on trade in an enemy's country, is bad, *McConnell vs. Hector*, 3 B. & P., 113; and see *De Mettou vs. Mello*, 12 East., 234; 2 Camp., 420; *Kensington vs. Inglis*, 8 East., 275, even though he be naturalized in a neutral State.—*O'Meally vs. Wilson*, 1 Camp., 482. The residence of a British subject in an enemy's country for the purpose of a trade, licensed by the government of this country, is not a disability to a petition.—*Ex parte Baglehoe*, 18 Ves., 525; 1 Rose, 271; *Roberts vs. Hardy*; 3 M. & S., 533; 2 Rose, 457.

In order to obtain an adjudication of bankruptcy against a banker, merchant, or trader upon the commission of the act of bankruptcy in the ninth subdivision of the section, the fact that the debtor is a banker, merchant, or trader must be established by proof, as well as the petitioning creditor's debt and the act of bankruptcy. It will be necessary, therefore, to state concisely what amounts to a trading within the meaning of the Bankrupt Law.

**What constitutes a Trading.**—Until the recent English Bankrupt Act, 24 and 25 Vict., chap. 134, no person but a trader was liable to be made bankrupt. The question of what constituted a trading has been the subject in England of interminable litigation, and the authorities are too numerous to cite in a treatise of this character. The principles upon which the leading authorities are founded will be sufficient for the purpose.

To constitute a *trading*, the transactions must not be isolated;

but if the intention be to carry on the particular pursuit to seek a livelihood thereby, a single act of trading will suffice.—*Heanny vs. Birch*, 3 Camp., 233.

The intention to trade, and not the quantity, is the test.—*Ex parte Moule*, 14 Ves., 602. A single instance of having traded will not support an adjudication of bankruptcy where the intent to trade generally is not proved.—*Ex parte Wilkes*, 2 Mont. & Ayr., 667. The true criterion to decide the question of trading is, not whether the party bought and sold to increase his income, but whether he pursued trading as his means of living. Where buying and selling is only auxiliary to the enjoyment of real property, as where the owner of a colliery sells coal that he has bought, with occasionally a portion of his own taken from his own mine, this is not a sufficient trading within the meaning of the act.—*Ex parte Salkeld*, 3 Mont., D. & D., 125. The publisher of a newspaper, buying the whole impression from the proprietors, reselling at a profit, and bearing the loss of such as remain unsold, has been held to be a trader within the Bankrupt Law.—*Gimingham vs. Laing*, 1 Rose, 472.

The *quantum* of the dealing or the smallness of the profit is immaterial, if it be proved that it was the intention of the party to deal generally, in which case evidence of one act of buying and selling is sufficient to constitute a trader within the Bankrupt Law.—*Newland vs. Bell*, Holt, 221, per Gibbs, C. J.; *ex parte Lavender*, 4 Deac. & Ch., 487; 2 Mont. & Ayr., 11.

The purchase of one lot of timber, with intent to sell again, will make a man a trader, even if the timber be standing at the time of the purchase.—*Holroyd vs. Gwynne*, 2 Taunt., 176; *Patman vs. Vaughan*, 17 R., 572; *Gale vs. Halfknight*, 3 Stark., 56; *Eden*, 3.

It is not necessary that the trade should be *legal*, *ex parte Meymott*, 1 Atk., 197; *Cobb vs. Symonds*, 5 B. & Ald., 516; *Wright vs. Bird*, 1 Price, 20, nor that it should be carried on in England; it is enough if it be *to* England.—*Dodsworth vs. Anderson*, T. Ray, 375; *Bird vs. Sedgwick*, Salk., 110; *Alexander vs. Vaughan*, Cowp., 398; *Allen vs. Cannon*, 4 B. & Ald., 418. And, by analogy to the case last cited, if trading to England be carried on in the United States, it is sufficient.

Whether a man is a trader within the meaning of the Bankrupt Law, is a question of law and not of fact.—*Hankey vs. Jones*, Cowp., 752. A trading to support an adjudication depends upon the intention; and it is a question for a jury whether there is enough to evidence such intention. The declarations of a debtor that he was in partnership with another as a trader, who afterward became bankrupt, are sufficient evidence to constitute a trading, although no acts of buying or selling were proved to have taken place during such partnership.—*Parker vs. Barker*, 3 Moore, 226.

An adjudication of bankruptcy may be supported upon a debt accruing before the bankrupt commenced to trade, and on an act of bankruptcy committed *after* he had ceased to trade.—*Baillie vs. Grant*, 9 Bing., 121. Where *part* of the petitioning creditor's debt was contracted after the bankrupt discontinued trading, and the balance was under the amount required by the statute, it was held

not sufficient to support an adjudication.—*Ex parte* Dalby, 4 Deac., 261; Mont. & Chitty, 636. Unless an adjudication could be supported upon an act of bankruptcy by a trader after he had ceased to trade, any merchant might, by retiring from trade when under pressure or embarrassment, evade the operation of the Bankrupt Law entirely. It has been laid down in the English decisions that an act of bankruptcy, when once committed, can not be purged; i. e., its effect can not be obviated by any subsequent conduct of the bankrupt.

Where a trader carried on business on his own account in London, and was also one of a firm in Ireland, and sent goods from England to that firm, it was held that the whole firm were traders within the English Bankrupt Statutes.—*Williams vs. Nunn*, 1 Taunt., 270.

To support an adjudication of bankruptcy, where it is necessary to prove the debtor was a trader, the debt of the petitioning creditor must have been contracted either previous to the trading, or during the time such trading was being carried on; but he can not be made a bankrupt in respect of debts contracted subsequently to his retiring from trade.—*Ex parte* Dewdney, 15 Ves., 495; 1 Selwyn's N. P., 175; 1 Rose, 402; 3 C. & P., 500.

A solicitor was adjudicated bankrupt as a scrivener on evidence clearly establishing the fact. On appeal against the adjudication he was examined, and the court being satisfied that, upon the additional evidence, he was not a scrivener within the meaning of the Bankrupt Law, annulled the adjudication, the lord chief justice expressing his agreement in the decision only on the authority of cases determined by Lord Eldon and Lord Chief Justice Gibbs.—*In re Dufaur*, Eng. Law & Eq., 550.

The earlier English cases establish that a contract to victual the navy will not make a man a trader, although he sell the surplus.—*Gilison vs. Thompson*, 3 Keble, 415. Commissioners of the navy, sutlers of the army, and farmers of customs were held not to be traders and liable to the Bankrupt Laws.—*Skinner*, 892; and case last cited.

In *ex parte* Wilson, 1 Atk., 218, it was said that a person who received money as a banker, although his books are kept in a different manner from that in which bankers' books are usually kept, and although, upon receiving any large sum, he pay it to his own established banker, upon whom he gives drafts for the payment of large bills upon him, he only keeping cash to answer small drafts, is a banker within the Bankrupt Statutes.

A trader resident abroad drawing bills upon this country for the value of other bills sent here for the sake of the exchange, and contracting debts here, is a trader within the Bankrupt Laws.—*Inglis vs. Grant*, 5 T. R., 530. But an occasional drawing and redrawing of bills, though for the sake of profit, as where it is done for the purpose of raising money to improve a person's own estate, does not render the person subject to the Bankrupt Laws.—*Hankey vs. Jones*, Cowp., 745.

The English Courts have held, that a person who has only held shares in a joint-stock banking company for two years, and has received two years' dividends upon them, is a trader, *ex parte Wyndham*, 1 Mont. Dea. & De., 146; and a creditor of the company may issue a fiat against him without proceeding in the first instance against the public officer of the company.—*Ex parte Wood*, *id.*, 92. An army or navy agent is not, as such, deemed a banker.—*Eden*, 6; 1 Mont., 12.

Mr. Christian, in his treatise on the Bankrupt Law, observes, that "the privilege of sweeping the streets, and of taking away the sweepings or manure, can hardly be thought a buying of merchandise. It is either part of the surface of the earth and not personal property, or it is derelict, and does not become property till it is collected and occupied. But with respect to dust and ashes, they are articles of property, trade, and merchandise, and the law upon the subject seems to be the same, whether a man buys a basket of ashes or a basket of coals. By acts of Parliament, the owners are restrained from selling themselves, but the parish officers are to sell the whole for the benefit of the parish; but that can make no difference with respect to the purchaser. One can not, therefore," he says, "see any reason why a purchaser of dust and ashes, and who seeks to make a profit, of them by selling them again, should not be a bankrupt, for a dealer in dung is just as much a trader as a dealer in diamonds."

It has been held, that where two parties took a lease of certain salt-works and brine-pits for the purpose of manufacturing and selling salt, which they made chiefly from the springs and rock salt upon the premises demised, but some of the brine they obtained by channels from adjoining premises, it was not a trading within this part of the clause.—*Ex parte Atkinson*, 1 Mont. Dea. & D., 300.

In cases where infants have traded and held themselves out to the world as adults, they are liable to be made bankrupts, but unless this is the case, a bankruptcy against an infant was superseded, although he was trading with a partner of mature age.—*Ex parte Banvis*, 6 Ves., 601; *ex parte Henderson*, 4 Ves. Jun., 440; *ex parte Hehir*, 3 Dea. & Ch., 107.

In *Cobb vs. Symonds*, 5 B. & A., 516; S. C., 1 D. & R., 111, the question was, whether a smuggler who had bought and sold smuggled goods, and never trafficked in legal merchandise, could be said to be a trader, subject and liable to the Bankrupt Laws. The court in that case said, "The words of the statute, 1 Jac., 1, c. 15, § 2, and the authority of Lord Hardwicke, in the case of *ex parte Meymott*, 1 Atk., 197, and the principle of the thing, called upon us to declare that a party circumstanced as now disclosed to us is an object of the Bankrupt Laws. The words of the act are general—'persons seeking their trade of living by buying and selling.' Now these words do not authorize us in determining that the Legislature did not intend to include in them every species of buying and selling, whether legal or illegal. Indeed, it would be very strange if a party could set up his own illegality to prevent himself being

made a bankrupt. As to the authority of Lord Hardwicke, it is true that the point now under discussion was not the point decided in *ex parte* Meymott; but Lord Hardwicke refers to it, and assumes it to be an incontrovertible proposition. As to the principle of the thing, the very circumstance that such party's trade is illegal, puts his estate in greater danger, and requires that his real creditors, whose debts are unaffected by the illegal transactions, should have the benefits accruing from a commission; the object of the Bankrupt Laws being to protect the meritorious creditors, and prevent them being placed in jeopardy by the improper speculations of their debtor. See *Ld. Raym.*, 444; 1 *Atk.*, 197.

But where there is distinct proof that a person bought goods, in conjunction with others, to carry on a system of fraud, by making away with the goods, and never selling any of them, it is no trading.—*Milliken vs. Brandon*, 1 C. & P., 380. A trader may become a bankrupt, although he has not taken out a license to render his trading legal.—*Sanderson vs. Bowles*, 4 Burr., 2066.

As a general rule, all persons engaged in any business (as distinguished from a profession, whether learned or otherwise), whatever their rank in society may be, might and still may be bankrupts as traders.—1 *Doria & Macrae*, 84-112, 119.

The buying and selling should be of "*goods or commodities*" within the meaning of this section of the act. Buying and selling land, or any interest in land, is not a trading.—*Port vs. Turton*, 2 Wils., 469; nor is buying and selling government stocks or securities.—*Colt vs. Netterville*, 2 P. Wms., 308.

**The Act of Bankruptcy—Proof of.**—Reference to the preceding notes upon the subject of acts of bankruptcy will sufficiently inform the practitioner as to the nature of the testimony to be adduced to support the adjudication.

Acknowledgments or admissions by the bankrupt before his bankruptcy are admissible in evidence.—*Watts vs. Thorp*, 1 Camp., 376; *Hoare vs. Coryton*, 4 Taunt., 580.

The act of bankruptcy must have been committed and be complete previously to the petition for the adjudication; and where this is not the case, and the creditor fails to establish it upon the hearing, application should be made to the court to withdraw the petition for adjudication and present another; this would be granted upon such terms as to costs that the court might deem reasonable.

The act of bankruptcy must be proved by some person who can speak to the fact from his own knowledge.

If the execution of a deed constitute the act of bankruptcy, such deed must be proved in the usual way by calling the attesting witness, and it has been held in the English courts that an admission by the debtor of the execution of the deed will not dispense with this evidence, even if the debtor, at the hearing of the proceedings for adjudication, should produce such deed upon notice.—*Abbott vs. Plumbe*, 1 Doug., 216; *Gordon vs. Secretary*, 8 East., 548. This proposition, however, has been doubted. At all events, in practice, the debtor might be summoned as a witness upon the hearing, and

examined as to his execution of the deed, and if he admitted such execution, that evidence would be sufficient, and supersede the necessity of calling the subscribing witness.—*Bowles vs. Langworthy*, 5 T. R., 366. The deed or conveyance will be good evidence of an act of bankruptcy as against the debtor, although it is void in its terms through fraud, as in the case of an insolvent trader who has conveyed all his property to an infant son.—*Whitwell vs. Thompson*, 1 Esp., 68.

Where a deed can not be produced before the register or court upon the hearing for adjudication, parol evidence of its contents may be given; or, if any person having possession of such deed, and duly summoned to produce it, does not do so, he may be committed for contempt.

Proof of the fraudulent nature of the conveyance or transfer may be inferred from extrinsic circumstances, as the situation of the trader and his affairs at the time, as well as from the deed itself, or from the grant or transfer. The circumstances which, extrinsic of the deed or transfer, usually afford evidence of fraud, are the embarrassed state of the trader's affairs, or that he was actually insolvent at the time, and that he knew he was so, *Newton vs. Chantler*, 7 East., 138, and was on the eve of a contemplated bankruptcy, *Devon vs. Watts*, 1 Doug., 85; that he intended to give an undue preference to a particular creditor, *Morgan vs. Horsman*, 3 Taunt., 241; or that there was nothing due to the assignee, *Scott vs. Thomas*, 6 C. & P., 611; and this is proved by his conduct and contemporary declarations, or other acts; that he executed the deed at an unreasonable hour of the night, or under other suspicious circumstances.—*Compton vs. Bedford*, 1 Bla., 362.

And it would be sufficient to show in evidence that this would be the effect of the conveyance; and it would be no answer to show that, as between the parties themselves, the transaction was fair and honorable, *Mont., B. L.*, 66; and for a good and valuable consideration, or that it was the result of importunity, *Butcher vs. East*, Doug., 294, or even of compulsion, *Newton vs. Chantler*, 7 East., 135, on the part of the creditor, if the necessary consequence would be to give an undue preference to one or more creditors to the prejudice and exclusion of the rest, *Worsley vs. Demattos*, 1 Burr., 467; though it might show the trader's solvency at the time of executing the deed, and the benefit resulting to the creditors in general.

The declaration of the trader connected with the fraudulent assignment are evidence toward establishing the act of bankruptcy.—*Ridley vs. Gyde*, 9 Bing., 349.

As to the proof of a fraudulent sale, gift, or transfer, the evidence must depend upon the particular circumstances of each case.

To prove, as an act of bankruptcy, that goods had been fraudulently given to certain creditors by the bankrupt, the plaintiff tendered evidence that they had, since the petition, returned them to the assignees. Held, inadmissible as against a third party, for it only amounted to an expression of an opinion by them that they were not entitled.—*Backhouse vs. Jones*, 6 N. C., 65.

Payment of a debt by a check may, under certain circumstances, amount to a fraudulent preference, when such payment was made without pressure, after a resolution had been come to by the debtors to suspend payment of their debts generally, it was held, under the circumstances of the case, a fraudulent preference, whether the debtors contemplated bankruptcy or not.—*Ex parte Simpson*, 1 De G., 19; 14 Law J., 1; title "Bankrupt."

Proof that the acceptor of a bill, two days before the expiration of the time for which the bill was originally drawn, called upon the indorser and informed him privately that he was insolvent; the indorser insisted upon being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, whereupon the acceptor paid it, and four days after became a bankrupt; it appeared also that the bill had been altered, so as to make it fall due before this transaction, but without the indorser's knowledge; these circumstances were held sufficient evidence of a fraudulent preference and act of bankruptcy.—*Singleton vs. Butler*, 2 B. & P., 283; *Cook vs. Rogers*, 7 Bing., 446.

The mere circumstance of the trader's being in insolvent circumstances, or contemplating insolvency, at the time of the assignment, is not conclusive evidence that he contemplated bankruptcy, there being no fraud, and no design to put the property in a train of distribution different from that of the Bankrupt Law.—*Burney vs. Viney*, 1 B. & B., 482, and vide 5 Taunt., 109; 1 B. & C., 5; *D. & R.*, 25.

Where A, a trader, purchased goods from B on the 8th of October for exportation, but finding that he must stop payment, and that he could not apply goods to the purpose for which they were bought, he returned them on the 16th of October to B, and on the 17th he stopped payment; though expecting remittances from abroad more than sufficient to pay his debts, he had no doubt that his creditors would give him time; they, however, refusing, he was made bankrupt on the 2d of November. Under these circumstances it was held, that the jury were warranted in finding that the delivery of the goods was not made in contemplation of bankruptcy.—*Fidgeon vs. Sharp*, 1 Marsh, 196; *Wheelwright vs. Jackson*, 5 Taunt., 549; *Moore vs. Barthrop*, 1 B. & C., 5.

Whether a party contemplated bankruptcy is a question for the court under all the circumstances of the case.—*Poland vs. Glyn.*, 4 Bing., 22 n.; *Flook vs. Jones*, 4 Bing., 20. To make out a case of fraudulent preference, the trader's knowledge is not sufficient unless actual bankruptcy was contemplated.—*Atkinson vs. Brindall*, 2 N. C., 225.

Where the act of bankruptcy is sought to be proved by the execution of an assignment to delay and hinder creditors, such assignment must be proved to be of the trader's own property, and not of property conveyed by another person to, or in trust for him.

Where A and B, being partners and insolvent, A assigned certain



property to B in trust for the wife of B, who was his daughter, it was held to be no act of bankruptcy by B, though he was a party to the deed.—*Whitwell vs. Thompson*, 1 Esp., 68, 71.

A return to the lender of a check given for a specific purpose and not applied to it, would not, it seems, be considered fraudulent so as to constitute an act of bankruptcy, *Moore vs. Barthrop*, 1 B. & C., 5; 2 D. & R., 25; so as to a return of goods by hirer to lender under a threat of issuing a fiat in bankruptcy.—*Ex parte Whitby*, 1 Mont. & Ch., 671.

In the cases of proving an act of bankruptcy by the giving of fraudulent preferences, it has been held that a legal preference is where property is duly and regularly transferred, per *Mansfield, C. J. Cowp.*, 123; illegal, where it is delivered by the bankrupt in contemplation, and on the eve of bankruptcy, voluntarily to a particular creditor, with a view of conferring on him a preference over the other claimants.

Two things must concur: insolvency in the debtor—voluntary payment or transfer by him.—*Crosby vs. Crouch*, 2 Camp., 166; 11 East., 256; *Alderson vs. Temple*, 4 Burr., 2235; 1 W. Black., 660.

Hence, where bankers fraudulently sold out stock belonging to one of their customers, but afterward, on the evening before their bankruptcy, sent him certain bonds to indemnify him, stating at the same time that they should be obliged to suspend their payments on the following morning, this was holden to be a fraudulent preference in contemplation of bankruptcy, and void, even although it appeared that the bonds had long before, and while the bankrupts were solvent, been put by them into an envelope with the customer's name upon it, and a memorandum of their being so deposited as a collateral security for the stock until replaced, but which circumstance was unknown to the customer.—*Wilson vs. Balfour*, 2 Camp., 579.

So where a trader, intending to commit an act of bankruptcy, made a bill of parcels of certain goods to one of his creditors to whom he wished to give a preference, and sent it to him, together with an order on the person in whose possession the goods then were, to deliver them to him, and he got them accordingly; it was holden that this, although a form of sale, being merely colorable for the purpose of giving a preference to the particular creditor, was void, and that the assignees of the debtor, upon his bankruptcy, were entitled to recover the value of the goods from the creditor.—*Rust vs. Cooper*, Cowp., 629; and vide *Nixon vs. Jenkins*, 2 H. Black., 135.

**Substituting a Petitioning Creditor.**—If the creditor who has petitioned for adjudication does not appear and prosecute the proceedings on the return day, or upon the day to which such proceedings have been adjourned, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate upon the original petition, without requiring a new service or publication of notice to the debtor.

This provision is adopted from the English Bankruptcy Amend-

ment Act, and in practice it is usual there to apply by petition for an order to substitute another creditor in the place of the original petitioning creditor, and to serve such order and notice upon the latter.—*Ex parte Ward*, 3 Mont., D. & D., 24.

The schedule of forms to the English Bankrupt Law Consolidation Act of 1849 contains the necessary order of substitution, and questions have been raised as to the requisite statements in such order to show jurisdiction.—*Christie vs. Unwin*, 11 Ad. & E., 373; *Brancker vs. Molyneux*, 4 Man. & G., 226.

The petition by another creditor is in lieu of the original debt, or alleged trading and act of bankruptcy, and no fresh proof will be necessary of such alleged matters, although no order of substitution should have been made. See *Kynaston vs. Davis*, 15 Mees & W., 705; 10 Jurist, 620; 15 L. J. Ex., 336.

According to the rule laid down by Sir J. Leach, then Master of the Rolls, in *ex parte Cousins*, 2 Glyn. & J., 270, the first petitioning creditor would be liable for the costs if the petition fails through his misconduct or fraud; but if through a mistake of law or fact, the costs would be paid out of the estate.—*Ex parte Whalley*, 3 Mont. & Ayr., 206; *ex parte Magnus*, 2 Mont., D. & D., 604.

The petition may, for adjudication by the creditor, be amended if not in accordance with the facts, 1 Fonb., B. C., 51; and where a petition, and the affidavits in support of it, had been wrongly intitled, and the petition had been amended under an order, the court allowed the affidavits to be taken off the file to be amended.—*Ex parte Burton*, 3 De Gex & S., 578; 1 *id.*, 257, 381.

**Opposing the Adjudication.**—Upon the return day, the debtor may appear in person or by counsel to show cause why the adjudication should not be made against him. He may at once, as has been before mentioned, demand a trial by a jury of the facts alleged in the petition or in the accompanying affidavits, in which case such trial will be appointed, or, if the debtor waives such right, the court or the register will proceed at once to a hearing.

Should the debtor fail to appear either by himself or his counsel, proof should be adduced of the due service of the order upon him, and the court will then proceed to adjudge the debtor a bankrupt, and make the formal adjudication.

Concurrently with the order of adjudication, a warrant is to issue, directed to the marshal, to take possession of the property and the estate of the debtor; and if the debtor has failed to appear in person or by attorney to show cause against the adjudication, and it is therefore made against him *ex parte*, a certified copy of such adjudication is to be forthwith served upon him by delivery or publication in the manner provided by the section for the service of the order to show cause.

The order of adjudication of bankruptcy will require the bankrupt forthwith, or within such number of days, not exceeding five, after the date of the order or of notice thereof, as shall be prescribed in said order, to make and deliver, or transmit by mail post-paid, to the messenger a schedule of his creditors and an inventory of his

estate in the form, and verified in the manner required of a petitioning debtor by Section 13. Vide notes to that section.

If the debtor has not appeared to show cause against the adjudication, and taken no part in opposing the proceedings, it then will be the duty of the messenger, in the event of his absence or inability to find the bankrupt, to prepare a schedule and inventory of the bankrupt's estate from the best information he can obtain.

During the proceedings for adjudication before a register, the 6th Section of the act provides that any party may take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the results of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof, and such certificate so signed shall be binding on all the parties to the proceeding.

No appeal is given to the alleged bankrupt against the order of adjudication, as by the English acts, nor any process by which he can annul such adjudication; it is therefore to be presumed that the decision of the register or of the court, or, in the event of his demanding a trial by jury, the verdict of such jury, will be final.

It was held, under the United States Bankrupt Act of 1841, that the District Court had jurisdiction to supersede the bankruptcy, and this will be the proper course to adopt where any circumstances occurring subsequently to the adjudication would justify such an application.—*Morris's Estate*, *Crabbe*, 70.

**The Order of Adjudication.**—The order of adjudication will be in the form to be prescribed by the general rules and orders.

The following decisions of the English Courts of Bankruptcy with respect to an application by the alleged bankrupt to suspend or rehear the proceedings for adjudication where he has made default to appear at the proper time specified in the notice, may upon this subject be practically useful.

A was adjudged a bankrupt in February, 1851, and on the 19th of the same month a duplicate of an adjudication was served on him. He did not, within the time limited by the 104th Section of the 12 and 13 Vic., c. 106, show cause to the court against the validity of the adjudication, and on the 28th of February the adjudication was advertised in the Gazette. On the 19th of March, A presented a petition to the commissioner, praying that the petition for adjudication of bankruptcy, or the adjudication thereunder, might be annulled.

Held, reversing the decision in 15 Jur., 984; S. C., 7 Eng. Rep., 312, that the commissioner had no jurisdiction to annul the adjudication after the time allowed by the 104th Section for showing cause against the validity of the adjudication had expired; and that the petition so presented to the commissioner was not a proper proceeding to dispute the adjudication within the meaning of the 233d Section of the act; and that, although a petition of appeal to the vice-chancellor from the order on that petition was presented within twenty-one days from the date of that order, according to

the 12th Section, but more than twenty-one days after the advertisement of adjudication, that the bankrupt was not entitled to have the adjudication annulled.—Carter *ex parte*, Eng. Law & Eq. Rep., 112.

Four partners were adjudicated bankrupts, two of whom resided abroad. The adjudication was made on the 8th of November. On the 13th notice was given of an application, on behalf of the partners abroad, to suspend the advertisement. On the 17th the meeting was held to show cause against the issue of the advertisement, and the application was then made. The commissioner refused to suspend the issue of the advertisement on the ground that, as the application was not made within the seven days, every thing was *in fieri*, and the commissioner had authority to grant the application. The matter was therefore sent back to the commissioner.—*In re Castelli*, 8 English Law & Eq. Rep., 280.

Where, under Section 223 of the Bankrupt Law Consolidation Act of 1849, 12 & 13 Vic., c. 106, the bankruptcy commissioner adjudicates a trader who has petitioned, under Section 212, to be a bankrupt, he must state in the order of adjudication the facts giving him jurisdiction so to do under Section 223, otherwise the order of adjudication is void.—*Lee vs. Rowley*, 8 Ellis & B., 857.

In the adjudications and proceedings, the bankrupts were described as of C. Lane in the city, colonial broker, and of W. Lane in the county of Middlesex, distillers. In the advertisement of the bankruptcy in the Gazette, the description was identical, except that W. Lane was said to be in the county of Essex. Held, that the misdescription was immaterial.—*Regina vs. Gordon*, 33 Eng. Law & Eq., 556.

**Removal of the Proceedings.**—The English Bankrupt Acts give power to one District Court to order the petition which has been presented to that court to be prosecuted in any other district, and to transfer any petition for adjudication of bankruptcy and the proceedings thereunder, and the prosecution or further prosecution thereof, from the Court of Bankruptcy in any one district to the court in any other district.

This act contains no such provision, but it is presumed that the District Courts would have the inherent power, after the proceedings have been instituted, to change the venue, and order the proceedings to be transferred to another district. In practice it will be found that the exercise of such a power will be of considerable importance. A debtor who has contracted debts and committed frauds in one state or district may, by a fictitious or collusive residence in another state sufficient to entitle him to petition for voluntary bankruptcy, evade the consequences of his misconduct or fraud.

This jurisdiction is exercised by the English Courts with a view to the interests of the creditors of the bankrupt generally, and to the more economical and advantageous administration of the estate.

Where the petition of adjudication had been filed in the country district in which the bankrupt resided and had property, but the

great majority resided in London and elsewhere out of the district in which the petition had been filed, the court, upon the application of one of such creditors, made with consent of the others, directed the removal of the petition and the proceedings thereunder from the country district to the Court of Bankruptcy in London.—*Ex parte Sewell*, 17 Jur., 333; 32 L. J. Bank., 29. The bankrupt was allowed his expenses of changing the venue of the fiat after adjudication.—*Ex parte Cheeseborough*, 1 De Gex, 333; *Anon.*, Mont. & Chit., 142.

The place of business of the bankrupt was in a town partly in one county and partly in another, but was actually in one of the two counties belonging to the more remote District Court. It was held, that the fiat ought not to be transferred on that account to the nearer.—*Ex parte Baylies*, 1 De Gex, 440. A fiat in bankruptcy against partners carrying on business in one bankruptcy district was issued in another district in which one of the partners was residing. The court, on petition, removed the fiat to the former district, although it was alleged that the separate property of the one partner, to which recourse would be necessarily had, was wholly situate in the district in which the fiat was issued.—*Ex parte Grylls*, 12 Jur., 171; 17 L. J. Bank., 7; vide *ex parte Hind*, 1 De Gex, 181.

The principle laid down by the Court of Review was, that after the jurisdiction had accrued, the power to change that jurisdiction should not be exercised unless a case of clear benefit to the estate was shown, and the absence of injustice to the bankrupt.—*Ex parte Mitchell*, 3 Mont., D. & D., 397.

Where the bankrupt carried on business in London, which was his last place of domicile, having been also engaged in mining speculations in Cornwall, and had been subsequently living with a relation near Dover under a feigned name, a fiat that had been issued to commissioners at Dover was ordered to be impounded, and the proceedings under it transferred to the Court of Bankruptcy in London, to which a new fiat was ordered to be issued.—*Ex parte Gregory*, 2 Mont., D. & D., 92.

The venue will not be changed because the existing means of communication between the place of trading and the District Court to which it belongs are not so convenient as those between the place of trading and another District Court.—*In re Oram*, 3 Mont., D. & D., 330; 7 Jur., 696.

It has been held, under the English Bankrupt Acts, that where adjudication has been once made, the court has no jurisdiction upon the application of the bankrupt to annul such adjudication where the bankrupt does not appear and show cause against such adjudication in compliance with the provisions of the act; if he desires to annul it, his only remedy is by an appeal to the Superior Court.—*Ex parte Carter*, 20 Eng. Law & Eq. Rep., 19.

## CHANGE FROM BANKRUPTCY TO ARRANGEMENT.

SECTION 43. *And be it further enacted,* That if, at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take, and hold, and distribute the estate, under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing, by or on behalf of three fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees, according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the

same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed; and such consent, and the proceedings thereunder, shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it; and the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors; and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this act; and the said trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt, and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons, and the production of books and papers, in the same manner as in other proceedings in bankruptcy under this act; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this act. If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bank-

ruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings; and the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming the proceedings shall not be reckoned in calculating periods of time prescribed by this act.

Several experiments were made in England for the winding up of insolvent debtors' estates subject to the supervision of the bankruptcy courts, few of which operated successfully.

Under a deed entered into between a debtor and his creditors with trustees appointed on behalf of each, one of the English acts of 1861 allowed such estate to be administered, subject to the control and regulation of the bankruptcy courts. The machinery was cumbrous and complicated, and the system was seldom adopted.

The recent English act for the amendment and consolidation of the law of bankruptcy contained the provisions which are adopted in this section.

After an adjudication in bankruptcy, either voluntary or compulsory, at the first meeting of creditors, or at a meeting to be specially called for such purpose, of which notice for the period and in the manner which the court may direct is to be given, three fourths in value of the creditors who have *proved* their debts have the right to determine and resolve that it is for the interest of the general body of the creditors that the bankrupt's estate should be wound up and settled, and the assets of the estate divided among the creditors by trustees, under the inspection and direction of a committee of the creditors.

The resolution should nominate the trustees, and should be certified by the creditors, and reported to the court. The bankrupt, and any of the creditors who have proved their debts, may be heard in opposition to the resolution, and the court may either confirm or refuse to confirm such resolution. In the event of the court refusing to confirm the resolution, the proceedings in the bankruptcy will be continued. If the court confirm the resolution, a consent by or on behalf of *three fourths in value* of all the creditors whose claims have been proved to such resolution, is to be signed and filed.

The bankrupt, or the assignee under the bankruptcy, if such has been elected or appointed, is then, under the direction of the court, and under oath, to transfer and deliver all the property and estate of the bankrupt to the trustees nominated in the resolution, and they are to hold the same with the same powers and rights in all respects as the assignees under the bankruptcy. The consent, and the proceedings thereunder, are to be binding in all respects upon all the creditors whose debts are provable under the bankruptcy, whether signed by such creditors or not.



Under the supervision and order of the court, the trustees are to proceed to wind up and settle the estate under the direction and inspection of the committee of the creditors, making the same distribution of the estate in all respects as would have been made had the bankruptcy proceeded.

On the application of the trustees, the court is to have the same power to examine the bankrupt, and all other persons, as provided by Section 26. Vide that section and notes.

The bankrupt also is to have the same right to apply for and obtain his order of Discharge under the bankruptcy after the passage of the resolution and the appointment of the trustees, as if the proceedings in the bankruptcy had not been thus superseded. Any period of time which may have elapsed between the date of the resolution of the creditors and the date of the order for resuming the proceedings in bankruptcy, in the event of the resolution not being confirmed by the court, is not to be reckoned in calculating periods of time prescribed by this act.

When such a resolution has been passed and confirmed by the court, it practically supersedes the bankruptcy, and places the control of the bankrupt's estate in the hands of the trustees, subject to the supervision of the committee of creditors, and the regulation and control in all respects of the court.

The trustees are to have all the rights and powers of assignees in bankruptcy. If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings.

It has been held that the Court of Appeal will not interfere with the discretion of a commissioner in bankruptcy who has decided that a proposed arrangement is not a proper one to force upon a dissentient minority of creditors, unless it is satisfied that such discretion has not been prudently and reasonably exercised, and that the evidence is clear and strong that the arrangement is such as ought to be agreed to.—*Ex parte Syers*, 39 Eng. Law and Eq., 304.

## PENALTIES AGAINST BANKRUPTS.

SECTION 44. *And be it further enacted,* That from and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof, out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent, or spend any part thereof in gaming; or shall, with intent to defraud, willfully and fraudulently conceal from his assignee, or omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of the proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by *bond fide*

transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

In the earlier legislation in England upon the subject of bankruptcy, misconduct on the part of the bankrupt was punished with extreme severity. Concealing or embezzling his effects to the value of twenty pounds was made a capital felony, and that punishment was not changed to transportation for life until a comparatively recent period.

Indeed, by the Statute of 5 & 6 Vict., chap. 122, if any person adjudged bankrupt after the commencement of that act should not, upon the day limited for his surrender, surrender himself to the court, and submit himself to be examined from time to time upon oath; or if any bankrupt should not, under his bankruptcy, discover all his real and personal estate, and when he disposed of or transferred such estate, or if he should have removed, concealed, or embezzled any part of such estate to the value of ten pounds or upward, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, every such bankrupt should be deemed guilty of felony, and be liable to be transported for life, or for such term not less than seven years as the court should adjudge.

The more recent legislation has much mitigated the severity of the law as respects bankrupts.

The United States Bankrupt Act of 1841 did not contain any enactment making the misconduct of the bankrupt a criminal offense.

The provisions of this section are adopted from the recent English Bankruptcy Amendment Act, and they also incorporate offenses committed by fraudulent insolvents under the existing laws of many States of the Union.

The following is an enumeration of offenses, which, when committed by the bankrupt, are created by this section misdemeanors, and render the bankrupt upon conviction liable to punishment by imprisonment, with or without hard labor, for a term not exceeding three years:

*First.—If any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate.*

*Second.—If he shall part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto.*

*Third.—If he shall remove, or cause to be removed, any property*

*belonging to his estate, or any part thereof, out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same.*

**Fourth.**—*If he shall make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate, with the like intent.*

**Fifth.**—*If he spends any part of the property belonging to his estate in gaming.*

**Sixth.**—*If he shall, with intent to defraud, willfully and fraudulently conceal from his assignee, or omit from his schedule any property or effects whatsoever.*

**Seventh.**—*If, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof.*

**Eighth.**—*If he shall attempt to account for any of his property by fictitious losses or expenses.*

**Ninth.**—*If he shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud.*

**Tenth.**—*If he shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for.*

To constitute any one of the above offenses, it must have been committed by the bankrupt *after the date of the passage of this act*, and the offenses created in the ninth and tenth subdivisions *within three months* next before the commencement of the proceedings in the bankruptcy.

It may be useful to take a cursory view of the state of the criminal law in this country and in England upon offenses, some of them analogous, and some exactly similar to those created by this section.

By the Statute 13 Elizabeth, which makes void all conveyances, etc., with intent to defraud creditors, it is provided that the parties to any "such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions," etc., "which at any time shall wittingly and willingly put in use, avow, maintain, justify, or defend the same or any part of them as true, simple, and done, had, or made *bona fide*, and upon good considerations; or shall alien or assign any the lands, tenements, goods, leases, or other things before-mentioned, to him or them conveyed, as is aforesaid," besides the civil penalty, "being lawfully convicted thereof, shall suffer imprisonment for one half year without bail or mainprize."

By Statute 27 Elizabeth the same provision is extended to those concerned in similar devices to defraud purchasers. See 2 Russ. on

Crimes, 315; Roberts' Digest, Brit. Stat., 294; 1 Chitty's Stat., 385.

There is but one case reported in the English books under this statute of an indictment and conviction. In that case the judgment was arrested after conviction upon technical grounds; but Mr. Justice Maule, in delivering the opinion of the Court of Appeals in Criminal Cases, held, that an indictment would lie under the Statute 27 Elizabeth for a fraudulent alienation of real estate.—*Reg. v. Smith*, 6 Cox, C. C., 36.

In New York, the removal of goods out of the county to prevent them being levied upon is a misdemeanor. Any person who shall remove any of his property out of any county with intent to prevent the same from being levied upon by execution, or who shall secrete, assign, or convey, or otherwise dispose of any of his property, with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent, shall, on conviction, be deemed guilty of a misdemeanor; and where the property so removed, secreted, concealed, assigned, conveyed, received, or otherwise disposed of, shall be worth fifty dollars or less, such offense may be tried by a court of Special Sessions of the Peace in the manner directed in the third title of chapter second of the fourth part of the Revised Statutes; and in such case the punishment for such offense shall be limited as prescribed in said title. See 26 of ch. 300 of 1831; Rev. Stat., N. Y., pt. ii., c. v., tit. 1, art. 10, § 30.

In Pennsylvania, if any person shall fraudulently or maliciously tear, burn, or in any way destroy any deed, lease, will, bond, or any bill or note, check, draft, or other security for the payment of money, or the delivery of goods, or any certificate of loan or other public security of this Commonwealth or of the United States, or any of them, or any certificate of the stock or debt of any bank, corporation, or society, either of this Commonwealth or the United States, or either of them, or of any foreign country, or any receipt, acquittance, release, or discharge of any debt, suit, or other demand, or any transfer of assurance or money, stock, goods, chattels, or other property, or any letter of attorney or other power, or any day-book or other book of accounts, or any agreement or contract whatever, with intent to defraud, prejudice, or injure any person, bank, body corporate, society, or association, the person so offending shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment not exceeding three years, or either, or both, at the discretion of the court.—Rev. Acts, Bill 1, § 129.

Fraudulently secreting or removing property by a debtor, is, by the laws of Pennsylvania, also a misdemeanor. Any person who shall remove any of his property out of any county with intent to prevent the same from being made liable for the payment of his debts, any person who shall receive such property with such intent, or who shall, with like intent, collude with any debtor for the concealment of any part of his estate or effects, or for giving a false

color thereto, or shall conceal any grant, sale, lease, bond, or other instrument or proceeding, either in writing or by parol, or shall become a grantee, purchaser, lessee, obligee, or other like party in any such instrument or proceeding, with like fraudulent intent, or shall act as broker, scrivener, agent, or witness in regard to such instrument or proceeding, with the like intent, such person or persons, on conviction thereof, shall be guilty of a misdemeanor, and be sentenced to pay a sum not exceeding the value of the property or effects so secreted, assigned, conveyed, or otherwise disposed of or concealed, or in respect to which such collusion shall have taken place, and undergo an imprisonment not exceeding one year.

The laws of the State of Pennsylvania upon the subject of fraudulent insolvency are analogous to the provisions of this section upon the subject of fraudulent bankruptcy.

It is enacted that it shall appear to the court, upon the hearing of any petition in insolvency, either by examination of the petitioner or other evidence, that there is just ground to believe either,

1st, That the insolvency of the petitioner arose from losses by gambling, or by the purchase of lottery tickets; or,

2dly, That such petitioner had embezzled or applied to his own use any money or other property with which he had been intrusted, either as bailee, agent, or depositary, and to the prejudice of opposing creditors; or,

3dly, That he has concealed any part of his estate or effects, or colluded or contrived with any person for such concealment, or conveyed the same to any person for the use of himself or any of his family or friends, or with the expectation of receiving any future benefit to himself or them, and with intent to defraud his creditors, in every such case it shall be the duty of the court to commit such person for trial.

If such debtor shall, upon trial, be convicted of any of the acts mentioned in the preceding section, he shall be adjudged guilty of a misdemeanor, and shall be sentenced as follows:

1st. If found guilty of embezzlement or concealment of property, as aforesaid, he shall be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

2dly. If it shall appear, by the verdict of the jury on such trial, that the insolvency of the petitioner was caused by gambling or the purchase of lottery tickets as aforesaid, he shall be sentenced to an imprisonment not exceeding three years.—Rev'd Acts, Bill 1, Sec. 132-3.

If any person, with an intent to defraud the creditors of an insolvent debtor, or any of them, shall collude or contrive with such insolvent debtor for the concealment of any part of his estate or effects for giving a false color thereto, or shall contrive or concert any grant, sale, lease, bond, or other instrument or proceeding, either in writing or by parol, or shall become a grantee, purchaser, lessee, obligee, or other like party in any such instrument or proceeding with the like intent, or shall act as broker, scrivener, agent or witness in regard to such instrument or proceeding, with the like in-

tent, such person shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars, and to undergo an imprisonment not exceeding two years, and shall forfeit all claim which he may have to any part of the estate of such debtor.

These statutes, so far as concerns the secreting of goods, may be treated as creating a new offense, which, though of recent origin, is of frequent occurrence in the courts. To constitute it—and the statutes are throughout so similar as to make the proceedings under them the same—it is necessary there should be:

1st, An actual secreting, assigning, or conveying of goods, etc., or a reception of the same.

2dly, An intent to prevent such property from being made liable for the payment of debts, or, in case of deception, a guilty knowledge of such intent.

1st. There must be an actual secreting or assigning of the goods. It is not enough that the debtor, in his creditor's face, refuses to surrender property which the creditor claims. Thus it was held that a refusal of a defendant to deliver up a watch to a sheriff's deputy was not within the statute.—*People vs. Morrison*, 13 Wend., 399.

The object of the law is not to make a man indictable who resists process, since for this another procedure exists; but to prevent the secret and covinous disposal of property in such a way as to elude the pursuit of the law, and baffle an execution. A pointed illustration of this is the case of a trader who, after obtaining credit by stocking his store with goods, either hides such goods until such time as he may be able, without suspicion or disturbance, to convert their proceeds to his own use, or consigns them to auction under such covers as may enable him to turn them into cash without his creditor's knowledge. It would seem, from analogy to the Statutes of Elizabeth, that the offense would continue to be indictable even if a consideration were received, if the intent to defraud was proved.

2dly. An intent must be shown to prevent the property from being made liable for the payment of debts; or, in case of receivers, a guilty knowledge of such intent.

It is not enough that it should be shown that the debtor's object was to give a preference to a particular creditor.—*Com. vs. Hickey*, 2 Parsons, 317.

All creditors are protected by the act; and as "creditors," it seems, may be classed even those whose debts are not yet due.—*Johnes vs. Potter*, 5 S. & R., 519.

In Pennsylvania, according to Judge Lewis, the Court of Criminal Sessions for the City and County of Philadelphia, created by the act of 19th of May, 1838, has jurisdiction of an indictment for fraudulent insolvency when the prisoner was committed for trial by the Court of Common Pleas of that county. Upon the fact, elicited in the course of an application for the benefit of the Insolvent Laws, either party, the debtor or creditor, may apply to the court to bind the petitioner over to answer the charge of intending to defraud

his creditors; and if acquitted by the jury, he must be discharged under the Insolvent Law by the court, and the court has no power to direct an issue to ascertain the facts in the shape of a civil case. Where a petitioner, after he had applied for the benefit of the Insolvent Law, made an assignment of all his estate in trust for particular creditors, the court refused to bind him over for trial, considering the assignment as different in its nature from that contemplated by the act of 1816.

In Maryland, in cases of fraudulent insolvency, the statute declares that the offender shall suffer as in case of willful and corrupt perjury, and be forever debarred from any benefit of the act.—Dorsey's Laws, p. 533, c. 110, § 9, 1805.

In Ohio, the statute provides that the offender shall be fined in any sum not exceeding five hundred dollars, or be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, not exceeding ten days, or both, at the discretion of the court.—Rev. St. of Ohio, ed. of 1854, p. 286, c. 33, § 12.

In Pennsylvania, it was held, that an indictment on the statute passed subsequently to the act of 24th of April, 1798, to prevent insolvent debtors from secreting their property from their creditors, can not be sustained on an assignment of transfer, which is only fraudulent in law. To constitute a criminal offense, there must be a fraud *in fact*—a criminal intention to interfere with the rights of the creditor.—Com. vs. Hickey, 3 Penn. L. Jour., 86.

In Maine, the making of a fraudulent assignment, with intent to hinder, delay, or defraud creditors, is punished by a fine not exceeding one thousand dollars, and imprisonment in the county jail not more than one year.—Rev. Sta. of Maine, p. 691, § 2.

In New York, Michigan, and Wisconsin, the statute provides that the debtor in such case shall, upon conviction, be adjudged guilty of a misdemeanor.—N. Y. Rev. Sta., 5th ed., vol. iii., p. 972; Rev. Sta. of Mich., c. 141, § 17; Rev. Sta. of Wis., ed. of 1858, pp. 400, 401.

In Vermont, the party to such a fraudulent conveyance forfeits the value of the property fraudulently conveyed.—Rev. Sta. of Vt., tit. 28, c. 114, §§ 23, 24.

In Illinois, the offender is punished by a fine not exceeding one thousand dollars.—Rev. Sta. of Ill., ed. of 1858, pp. 400, 401.

In England, upon an indictment under 1 & 2 Vict., c. 110, § 99, against an insolvent for willfully and fraudulently omitting sums of money which had been received by him prior to the date of the vesting order, and which, in accordance with 1 & 2 Vict., c. 110, § 69, should have been inserted in the special balance sheet which had been filed by the defendant; there, however, they had been omitted, Lord Abinger, C. B., held, that the indictment would not lie under the circumstances. The special balance sheet was, as it were, a mere memorandum of the insolvent's receipts and disbursements for the guidance of the court, and a man should not be held thus criminally responsible for errors therein. The consequence of such an interpretation of Section 99 as would be necessary for the purpose of this indictment, would be to make a highly penal clause



apply to cases possibly of no intentional fraud, and of comparatively trifling inaccuracy. The section applied only to cases where the omission would affect the interests of creditors, and not where it is a mere omission of money received and subsequently expended by the insolvent.—*Reg. vs. Warner*, 1 C. & Marsh., 628.

In England, it appears to have been holden, that where an indictment against a bankrupt for concealing property did not, in stating the property, sufficiently specify the particular parts of it, though it might have sufficiently specified others, and those specified might have been of the necessary value, such indictment was bad, on the ground that the statement as to the parts not specified tended to embarrass the prisoner; and the decision appears to have proceeded upon the principle, that where value is essential to constitute an offense, and the value is ascribed to many articles collectively, the offense must be made out as to every one of these articles, the grand jury having only ascribed that value to all those articles collectively.—*Rex vs. Forsyth, Russ. & Ry.*, 274.

An indictment against a bankrupt for concealing part of his personal estate must conclude against the form of the statute, or it is bad in arrest of judgment. The indictment, after stating the prisoner was a tradesman, alleged that he did not disclose or discover all his estate and effects to the commissioners, but fraudulently and feloniously concealed and embezzled part of his personal estate, specifying it. To this indictment it was objected, in arrest of judgment, that the offense was not stated to be done against the form of the statute, and, upon a case reserved, the judges were unanimously of opinion that the omission of *contra formam statuti* was not cured by the 7th George IV., chap. 64, §§ 21, 22, and was fatal to the indictment.—*Rex vs. Radcliff*, 2 M., C. C., 68; S. C., 2 Lew., 57.

In point of law, the prosecutor may prefer separate indictments for the fraudulent omission of each article. To an indictment for fraudulently omitting ten chairs, ten tables, two carts, etc., the prisoner pleaded *autrefois acquit*; and the former indictment was the same as the present, except that the two carts mentioned in the present indictment were not mentioned in the former one. It was, however, submitted, that the two charges were substantially the same; the charge in each indictment was, that the prisoner had fraudulently sworn to a schedule which did not contain a true enumeration of his goods.—*Ratteson, J.*: "I can not say that the plea of *autrefois acquit* is in strictness a good defense to the whole of this indictment. The prisoner may have fraudulently omitted out of his schedule the goods mentioned in this indictment which were not mentioned in the last, and, in point of law, I think a prosecutor may prefer separate indictments for each omission; but, though the present indictment be in point of law maintainable, I can not help saying that, excepting under very peculiar circumstances, I think such a course ought not to be pursued; and if the case goes on, I shall strongly advise the jury to acquit the prisoner, unless they think that the goods, now for the first time brought forward, were

omitted out of the schedule under circumstances essentially different from the others."—*Rex vs. Champneys*, 2 M. & Rob., 26.

In *Rex vs. Evani, R. & M.*, C. C., 70, it was held, that the indictment might be preferred in Middlesex if the prosecutor could prove an actual concealment there, although the last examination of the bankrupt took place in London.

It has been held necessary to prove regularly the trading, the petitioning creditor's debt, the act of bankruptcy, the issuing of the commission, and the subsequent proceedings. While the commission subsists, its validity may be assumed for certain civil purposes; but when a criminal case occurs, unless the party was a bankrupt, all falls to the ground.—*Rex vs. Punshon*, 5 Campb., 97. In a case where the defendant was indicted for refusing to give the commissioners an account of his effects, he was acquitted on the ground that he was an infant at the time the debt was contracted, and could not, therefore, be a bankrupt for debts which he was not obliged to pay.—*Rex vs. Cole*, 1 Ld. Raym., 443. And it has since been held that a commission against an infant is void; and the Court of Chancery refused to lend its aid to a prosecution on that statute by ordering the clerk under the commission to attend the trial and produce the proceedings.—1 Hawk., P. C., c. 49.

It was also ruled, that on an indictment against a bankrupt, where the petitioning creditor's debt was alleged to be due to A, B, and C, surviving executors of the last will and testament of D, after proof that A, B, and C were the executors, and were directed by the will to carry on the business, it was necessary to prove that they all assented to act in discharge of the trust, and that a general omission by the prisoner of a debt due to the executors of D would not supply the defect.—*Rex vs. Barnes*, 1 Stark. R., 243.

It was held in England that the bankrupt is not indictable for concealment until he has concluded his last examination. A bankrupt was indicted for not delivering up certain account-books, and it appeared that the final examination had never been completed, but that it had been adjourned *sine die*; it was held that he must be acquitted, for, until the examination was concluded, he had a *locus penitentiae*, and might deliver up all his books correctly.—*Rex vs. Walters*, 5 C. & P., 138.

Upon an indictment against a bankrupt for concealing his effects, where the evidence was, that the prisoner, on his last examination, stated that a book given in by him contained an account of all his effects, it was holden to be incumbent on the prosecutor to produce the book, or to account for its non-production. The book was a necessary part of the prosecutor's case, in order that it might have been seen whether that book mentioned the property.—*Rex vs. Evani*, 1825, R. & M., C. C. R., 70. In the same case it was held, at the trial, that it was not necessary that the goods should be concealed by the prisoner himself, or that he should have had the possession of them after the bankruptcy; but that it was sufficient if another person had them as his agent and subject to the control of the prisoner, and had taken them by the direction, and with the privity and

knowledge of the prisoner, to the place where they were deposited. Vide same case.

Where an indictment for conspiracy stated the bankruptcy of one of the defendants in a prefatory allegation, Lord Tenterden, C. J., held, that the assignment could not be put in evidence without calling the attesting witness.—*Rex vs. Pope*, 5 C. & P., 208.

Parol evidence of any thing a bankrupt says at the time of his last examination can not be received, although it appear that no part of what he said was taken down in writing. The paper purporting to be the final examination did not contain any questions or answers; it merely stated that the commissioners, not being satisfied with the answers of the bankrupt, adjourned the examination *sine die*, and it was proposed to give parol evidence of what the bankrupt said before the commissioners, which it was contended might be done, as it was shown that what the bankrupt said was not taken down; and besides, by Section 36, the commissioners are empowered to examine by parol.—*Park, J.*: "I can receive no evidence of the examination but the writing." The examination is required to be in writing by the Act of Parliament, and that part which relates to the examining parol applies only to the questions which may either be put by parol or by written interrogation.—*Rex vs. Walters*, 5 C. & P., 138.

Where an indictment alleged that after the examination of the bankrupt, and after he had subscribed the same, a question was put to the bankrupt, and it was objected to any evidence being given of questions and answers which were not reduced to writing. It was replied that the material answers alone were taken down; and it sometimes happened that answers which at the time seemed immaterial, afterward became material. The answers proposed to be given in evidence were given after the examinations were concluded in the first instance, that they also were reduced to writing.—*Williams, Justice*: "I can not receive parol evidence of any answers to questions that were put to the bankrupt before the commissioners subscribed their names to the examination. I must presume that all the answers prior thereto that were material were taken down and included in the examination before their signatures were affixed to it. But answers to questions put subsequently to such examination may be given in evidence."—*Rex vs. Radcliffe*, 2 Lew., 27.

In England it has been held, that the balance sheet of a bankrupt, signed and sworn by him, was not evidence against him on an indictment for concealing his effects, to prove the petitioning creditor's debt.—*Rex vs. Britton*, 1 M. & Rob., 297. The ground of this decision was, that the balance sheet could not be given in evidence, unless there was a valid commission, and, therefore, the balance sheets being part of the proceedings, could not be put in evidence to prove the petitioning creditor's debt as a part of the commission.—*Per Patteson, J.*, in *Reg. vs. Wheeler*, *infra*. But it has since been held, that the examination of a person taken on oath before a commissioner of bankruptcy is admissible against him on a charge

of forgery, he having been cautioned and allowed to elect what questions he would answer.—Reg. vs. Wheeler, 2 Moo., C. C. R., 45.

It was decided in England that a bankrupt's wife could not be examined on the part of the prosecution, on an indictment against the bankrupt for offenses against the 5 Geo. 2, chap. 80, 1 Hawk, P. C.; c. 49 Fraudulent Bankruptcy, § 4.

It was held by Coleridge, J., that the words "with intent to defraud his creditors" override the whole section, and that an indictment against a bankrupt for not surrendering on the day limited, which did not aver that it was "with intent to defraud his creditors," was bad.—R. vs. Hall, Ass., 1846.

On an indictment under the 5 & 6 Vict., c. 122, § 32, against a bankrupt for not surrendering upon the day limited, Coleridge, J., held that the production of the adjudication enrolled, with a copy of the gazette containing the advertisement of the act of bankruptcy, sufficiently supported the indictment, although it averred the trading petitioning creditor's debt and act of bankruptcy.—R. vs. Hall, Ass., 1846., M. S.

The bankrupt's examination may be proved by its production, and by the evidence of the solicitor to the commission, or other person who was present at the time, and can speak of its having been regularly taken.

In order to bring the prisoner within the statute, it must appear that there was a criminal intent in his refusing to disclose his property. Thus, where the prisoner was indicted under the 5th Geo. 2, c. 30, for not submitting to be examined and truly disclosing his property, and the evidence was that on the last day of his examination he appeared before the commissioners and was sworn and examined, but as to certain parts of his property refused to give any answer, stating that this was not done to defraud his creditors, but under legal advice to dispute the validity of his commission, and the prisoner was convicted, the judges, on a case reserved, held the conviction wrong.—Page's case, Russ. & Ry., 392; 1 Brod. & B., 308.

Where a bankrupt was indicted under the 6 Geo. 4 for not surrendering, and it appeared in evidence that he was in custody under a detainer collusively lodged, it was urged for the prosecution that, though in custody, he was bound to give notice of his situation to the commissioners, in order that they might issue their warrants to bring him before them, or that he ought to have applied for a *habeas corpus* to enable him to appear before them, or that, at all events, he ought to have applied to the chancellor to enlarge the time for surrender. But Littledale, J., said, "that the act was to be construed favorably toward the prisoner, who was not bound to make the application contended for; and that, as the commissioners had power to issue their warrant, and by diligent search might discover where he was, the bankrupt was not bound to give them notice." He was also of opinion that the prisoner was not guilty of felony, though the detainer under which he was in custody was collusive.—Mitchell's case, 1 Lewin, C. C., 20; 4 C. & P., 251.

If, on his examination, the bankrupt refer to a document as containing a full and true discovery of his estate and effects, it is incumbent on the prosecutor to produce that book, or to account for its non-production, for otherwise it can not be known whether the effects have been concealed or not.—*Evani's case*, 1 Moody, C. C., 70.

It is not necessary that the concealment should have been effected by the hands of the prisoner himself, or that he should be shown to have been in the actual possession of the goods concealed. After the issuing of the commission, it is sufficient if another person, having the possession of the effects as the agent of the prisoner, and holding them subject to his control, is the instrument of the concealment.—See *Evani's case*, 1 Moody, C. C., 74.

The evidence of the concealment, and of the guilty intent with which the act is done, ought to be very satisfactorily made out, and should be so clear as to leave little doubt on the point.

Concealment of goods in the houses of neighbors or of associates, or in secret places in the bankrupt's own house, or sending them away in the night and endeavoring to escape abroad with part of his effects, etc., constitute the usual proofs in cases of this description.—See *Alison*, Principles, C. M., Law of Scotland, 571.

Upon an indictment under the Bankrupt Law Consolidation Act, 12 & 13 Vict., c. 106, § 253, it is not enough to prove the petition to, and adjudication of the Court of Bankruptcy, but the preliminary matters, namely, the petitioning creditor's debt, the trading, and act of bankruptcy must be also proved. Where, therefore, upon such an indictment, the act of bankruptcy relied on was the filing a petition in the insolvent court, and the only evidence offered was a copy of the petition, duly signed and certified by the proper officer, in accordance with the 239th Section of the act, but the time of filing such petition was only shown by an indorsement on the back of the copy, such indorsement not being certified in any way, or referred to by the petition, it was held, that although the petition to, and adjudication by the Court of Bankruptcy were proved, yet that it was also necessary to prove the act of bankruptcy, and that the evidence was not sufficient for that purpose.—*Regina vs. Lands*, 33 Eng. Law and Eq., 536.

It was in the same case also held, that if the notice to surrender was duly served, and the bankrupt did not surrender pursuant to it, he would be guilty of the offense of not surrendering, though he had no actual knowledge that he had been made a bankrupt; and also that, assuming the words in the 251st Section, "with intent to defraud his creditors," applied to the case of a bankrupt not surrendering, yet that the absconding with the intent proved, was sufficient.—*Regina vs. Gordon*, 33 Eng. Law and Eq., 556.

Held, by a majority of the judges, that the conviction was bad, as a separate notice to surrender had not been left for each of the bankrupts at their last place of business.—*Regina vs. Gordon*, 33 Eng. Law and Eq. And also, that although the petition was allotted to Commissioner G, yet that any other commissioner might sit and act for him; consequently, that the notice to surrender, though

signed by Commissioner H, was good, and that it was the bankrupt's duty to surrender before Commissioner F, who was sitting for Commissioner G on the day appointed; that it was no objection to the notice that it was to surrender on one of two days, one of which was passed at the time of the service of the notice, as the last of the two days was the day limited according to the statute for the surrender.—*Regina vs. Gordon*, 33 Eng. Law and Eq., 556.

Held also, that searching at the counting-house, and giving the bankrupt notice to produce, were sufficient to allow of production of secondary evidence of the documents left at the counting-house.—*Regina vs. Gordon*, 33 Eng. Law and Eq., 556.

### PENALTIES AGAINST OFFICERS.

SECTION 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several Courts of Bankruptcy shall, for any thing done or pretended to be done under this act, or under color of doing any thing thereunder, willfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or any thing of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof, shall forfeit and pay the sum of not less than three hundred dollars, and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

SECTION 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or shall forge or counterfeit the seal of the courts, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court,

subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and, upon conviction thereof, shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

Extortion, in its general sense, signifies any oppression by color of right, but technically it may be defined to be the taking of money by an officer by reason of his office.

Almost every State of the Union makes such offense an indictable misdemeanor.

It is also an offense at common law, punishable by fine and imprisonment, and the removal from the office in the execution of which it was committed.

In New York, the statute provides, that no fee or compensation allowed by law shall be demanded or received by any officer or person for any service, unless such service was actually rendered by him, except in the case of charges for prospective costs, as specified in the act.

A violation of the act is deemed a misdemeanor.—2 New York Rev. Stat., title 4, part 3, cap. 10, § 6.

In Vermont, the Constitution provides that if any officer shall wittingly and willfully take greater fees than the law allows him, it shall ever after disqualify him from holding any office in the State, until he shall be restored by act of Legislature.

In Ohio, it is an indictable offense in public officers to exact and receive any thing more for the performance of their legal duties than the fees allowed by statute.—*Gilmore vs. Lewis*, 12 Ohio Rep., 281.

In New Jersey, it is enacted, that any officer who receives greater fees than are allowed by law, shall restore to the party aggrieved double damages and costs, and shall be punished by fine and imprisonment, or both, or by fine or imprisonment at hard labor, or both, the fine not to exceed four hundred dollars, nor the imprisonment the term of two years.—Rev. Stat. of New Jersey, p. 264, § 25.

In Pennsylvania, a few years after a decision had been pronounced that a statute, which gave a penalty of fifty dollars for extortion, took away the remedy by indictment, the Legislature passed an act by which that remedy was restored, and enacting that, in addition to the action for the penalty, in all cases where an officer shall willfully, fraudulently, and corruptly charge, demand, or take any of the fees, where the business for such fees are chargeable shall not have been done and performed, he may be indicted for misdemeanor.—*Lewis's Crim. Law*, 272.

In Maine, the statute provides that if any person shall corruptly and willfully demand and receive of another for performing any service or official duty, for which the fee or compensation is established by law, or shall receive security for any greater fee or com-

pensation than is allowed or provided for the same, or if any witness shall falsely and corruptly certify that, as such, he has traveled more miles or attended more days than he has actually traveled or attended, he shall be punished, on indictment and conviction, by a fine not exceeding thirty dollars for each offense; or he shall forfeit a sum not more than thirty dollars for each offense, to be recovered by action of debt, in which latter case the forfeiture shall accrue to the person who shall first sue for the same in his own name; but no indictment or action for such offense shall be sustained, unless commenced within one year after the commission of the offense.—Rev. Stat. of Maine, p. 680, § 17.

In Georgia, the statute upon this subject provides that any officer demanding or extorting any fees by color of his office illegally shall be subject to indictment, and, on conviction, shall be punished by fine, at the discretion of the court, and shall, moreover, be dismissed from office.—Hotchkiss's Law of Georgia, p. 736, § 57.

In Wisconsin, no judge, justice, sheriff, or other officer whatever, or other person to whom any fees or compensation shall be allowed by law for any service, shall take or receive any other or greater fee or reward for such service but such as is or shall be allowed by the laws of this State.—Rev. Stat. of Wis., p. 677, § 43.

By the Act of Congress, 3d of March, 1825, Sec. 12, it is declared, that if any officer of the United States shall be guilty of extortion under or by color of his office, every person so offending shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding one year, according to the aggravation of the offense.

Forgery of the signature of any judge, register, or other officer of the Court of Bankruptcy, or forging or counterfeiting the seal of any of the courts, or knowingly concurring in the use of any forged or counterfeited signature for the purpose of authenticating any proceeding or document in the course of the proceedings in bankruptcy, or tendering in evidence any proceeding or document with a false or counterfeited signature of any judge, register, or other officer of the Court of Bankruptcy, with a guilty knowledge, is made by the section a felony, with a liability, upon conviction, to be fined, and to be imprisoned for a term not exceeding five years.

The statutes of the United States contain no enactment of a similar character. Forging and counterfeiting public securities, treasury-notes, stamps, deeds, or powers of attorney, for the purpose of defrauding the United States, or for the purpose of selling or conveying any shares in public stock, debts, pensions or annuities, or certificates of registry, or enrollment of ships, are made criminal offenses by various acts of the United States, but there is no enactment similar to that contained in this section. The act of 1790, § 15, declares, that if any person shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ, process, or other proceedings, in any of the courts of the United States, by means whereof any judgment shall be reversed, made void, or not take effect, or if any person acknowledge, or procure to be acknowledged



in any of the courts aforesaid, any recognizance, bail, or judgment, in the name or names of any other person or persons not privy or consenting to the same, every such person or persons, on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and whipped not exceeding thirty-nine stripes. This enactment, however, would not comprehend the species of offense created by this section.

The criminal statutes of the State of New York make it the crime of forgery in the second degree to forge or counterfeit the seal of any public office authorized by law, or the seal of any court of record.

The Revised Statutes of Massachusetts make it a felony to make, or to forge, or counterfeit any public record, or any certificate, return, or attestation of any clerk of a court, public register, notary public, or any other public officer in relation to any matter wherein such certificate, return, or attestation may be received as legal proof.

By the laws of Pennsylvania, if any person shall falsely and fraudulently forge or counterfeit, or falsely and fraudulently be concerned in the forging and counterfeiting the great or less seal of the Commonwealth, the public and common seal of any court, office, county, or corporation, or any other seal authorized by law; or shall falsely and fraudulently utter and publish any instrument or writing whatever impressed with such forged and counterfeited seal, knowing the same to be forged and counterfeited, he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment by separate or solitary confinement at hard labor not exceeding seven years.

The Code of Virginia makes it felony, if any free person forges any public record, or any certificate of a judge, justice, public register, or any public officer, in relation to any matter where such document may be received as legal proof, and makes the uttering or attempting to employ as true such forged record or certificate, knowing the same to be forged, equally a felony.

The statutes of Ohio also contain similar enactments.

## FEES AND COSTS.

SECTION 47. *And be it further enacted,* That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers:

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust-deed for bankruptcy, two dollars.

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this act, one dollar.

For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions, the fees now allowed by law.

For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered, the assignee shall pay

out of the estate to the messenger the following fees, and no more:

1st. For service of warrant, two dollars.

2d. For all necessary travel, at the rate of five cents a mile, each way.

3d. For each written note to creditor named in the schedule, ten cents.

4th. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section 10, from prescribing a tariff of fees for all other services of the officers of Courts of Bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.

#### INTERPRETATION CLAUSE.

SECTION 48. *And be it further enacted,* That the word "assignee" and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number

of days is prescribed by this act, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

#### DISTRICT OF COLUMBIA AND TERRITORIES.

SECTION 49. *And be it further enacted,* That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia, and in and upon the Supreme Courts of the several Territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said Territories. And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a Circuit Court in bankruptcy may be exercised by the district judge.

The Territorial courts are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States.

In legislating for them, Congress exercises the combined powers of a general and of a state government.

The powers conferred on the courts of the United States do not apply to the Territorial courts unless they are specially named.

In the District of Columbia, the Supreme Court is to exercise all the jurisdiction and powers vested by this act in the District Courts which are constituted Courts of Bankruptcy, and where the bankrupt resides in either of the Territories of the United States, the same jurisdiction is conferred upon the Supreme Courts of the several Territories.

### COMMENCEMENT OF THE ACT.

SECTION 50. *And be it further enacted*, That this act shall commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval: *provided*, that no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini eighteen hundred and sixty-seven.

Approved March 2d, 1867.

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## BANKRUPTCY PREFERENCE.

SUPREME COURT OF THE UNITED STATES.—  
 BER TERM, 1873.

WILSON, ASSIGNEE OF VANDERHOFF, BANKER  
COMPLAINANT, v. THE CITY BANK OF ST. PAUL

1. Under a sound construction of sections thirty-five, thirty-nine of the bankrupt law something more than passive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defense.
2. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law.
3. Though the judgment creditor in such a case may know the insolvent condition of the debtor, his judgment and levy upon his property are not, therefore, void, and there is no violation of the act.
4. A lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after levy of the execution or rendition of the judgment.
5. Very slight circumstances, however, which tend to show the existence of an affirmative desire on the part of the bankrupt to give a preference, or to defeat the operation of the act, may, by giving color to the whole transaction, render the lien void.
6. These special circumstances must be left to decide each case as it arises. The present one is destitute of all such evidence.

On a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Minnesota.

Mr. Justice MILLER delivered the opinion of the court.

This case comes before us on a certificate of division in opinion between the circuit and district judges for the district of Minnesota.

It is said, however, that such an intent is a legal inference from such action by the debtor, necessary to the successful operation of the bankrupt law; that the grand feature of that law is to secure equality of distribution among creditors in all cases of insolvency; and that, to secure this, it is the legal duty of the insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy.

for, logically, an actual purpose to prefer one creditor to another, or to hinder or delay the operation of the

said suit was brought against them by the bank, and the bank had then reasonable cause to believe it, and knew that they had committed an act of bankruptcy, and that they had no property but their said stock in trade. The Vanderhoffs gave no notice to any of their creditors of the suit commenced against them by the bank, and, having no defense, did not defend it nor go into voluntary bankruptcy, nor otherwise make any effort to prevent the judgment being obtained or the levy of the execution.

On the trial the following questions arose, in relation to which the judges were opposed in opinion:

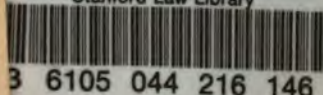
I. Whether or not an intent on the part of said debtors, Vanderhoff Bros., to suffer their property to be taken on legal process, to wit, the said execution, with intent to give a preference to said bank, or with intent thereby to defeat or delay the operation of the bankrupt act, can be inferred from the foregoing facts.

II. Whether, under said facts, the said bank in obtaining said judgment and making the said levy had reasonable cause to believe that a fraud on the bankrupt act was intended.

III. Whether, under said facts, the bank obtained by the levy of the execution a valid lien on the said goods as against the assignee in bankruptcy.

The questions thus presented to this court requires, for a satisfactory answer, a careful consideration and construction of sections thirty-five and thirty-nine of the bankrupt law, with reference to the general spirit and purpose of that law. In looking to these the first and most important consideration which demands our attention is the discrimination made by the act between the cases of voluntary and involuntary bank-

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undoubtedly, the facts stated bring the bank within the proviso, as to knowledge of the debtor's insolvency; and if the debtor suffered his property to be taken within the meaning of the statute, with intent to defeat or delay the operation of the act, then the assignee should recover the property, so that this surference and this intent on the part of the bankrupt are the matters to be decided. The first and principal question on which the judges became divided is, whether such intent is to be inferred from the facts stated. The thirty-fifth section of the act, which is designed to prevent fraudulent preferences of a person in con-



